Docket for 03-7434

(17)

No. 03-7434
Vide 03-878
Title: Daniel Benitez, Petitioner
v.
Michael Rozos, Field Office Director, Miami, Florida, Immigration and Customs Enforcement
Docketed: November 14, 2003
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (02-14324)
Decision Date: July 17, 2003
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 14 2003	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 15, 2003)
Nov 19 2003	Brief of respondent Robert Wallis, Director, Immigration and Naturalization Service filed.
Nov 20 2003	Reply of petitioner Daniel Benitez filed.
Dec 4 2003	DISTRIBUTED for Conference of January 9, 2004.
Jan 12 2004	DISTRIBUTED for Conference of January 16, 2004.
Jan 16 2004	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, February 25, 2004. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 26, 2004. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 19, 2004. Rule 29.2 does not apply.
Feb 16 2004	Joint appendix filed.
Feb 24 2004	Brief amicus curiae of North Carolina Justice and Community Development Center filed.
Feb 25 2004	Brief of petitioner Daniel Benitez filed.
Feb 25 2004	Brief amici curiae of Regina Germain and Ira Kurzban filed.
Feb 25 2004	Brief amicus curiae of American Bar Association filed.
Feb 25 2004	Brief amicus curiae of American Civil Liberties Union filed.
Feb 25 2004	Brief amici curiae of Florida Immigrant Advocacy Center and Rafael Penalver filed.
Feb 25 2004	Brief amici curiae of Law Professors, Aleinikoff, et al. filed.
Feb 25 2004	Brief amici curiae of Lawyers Committee for Human Rights, et al. filed.
Feb 25 2004	Brief amici curiae of Legal and Service Organizations, AALDEF, et al. filed.
Feb 25 2004	Brief amici curiae of American Immigration Law Foundation Legal Action Center, et al. filed.
Mar 1 2004	This case is consolidated with No. 03-878, Clark v. Martinez, and a total of one hour is allotted for oral argument.
Mar 16 2004	Extension of time within which to file respondent's brief on the merits in No. 03-7434 to and including April 26, 2004.
Apr 12 2004	Further extension of time in No. 03-7434 within which to file respondent's brief on the merits.
Apr 12 2004	Extension of time in No. 03-878 within which to file the joint appendix and petitioners'

	brief on the merits to and including May 7, 2004.
May 7 2004	Brief of respondent Robert Wallis, Director, Immigration and Naturalization Service filed.
May 7 2004	Brief amici curiae of Washington Legal Foundation, et al. filed.
May 7 2004	Motion to appoint counsel filed by petitioner.
May 18 2004	Motion DISTRIBUTED for Conference of June 3, 2004.
May 26 2004	Motion for additional time to argue and for divided argument filed by counsel for Martinez and Benitez. VIDED.
May 27 2004	Extension of time within which to file respondent's brief in No. 03-878 on the merits to and including July 19, 2004.
May 27 2004	Application (03A982) to extend the time to file a reply brief on the merits in No. 03-7434 from June 11, 2004, to July 17, 2004, submitted to Justice Kennedy.
May 28 2004	Application (03A982) granted by Justice Kennedy extending the time to file until July 16, 2004.
Jun 7 2004	Motion to appoint counsel filed by petitioner GRANTED. John S. Mills, Esquire, of Jacksonville, Florida is appointed to serve as counsel for the petitioner in this case.
Jun 14 2004	Motion of Martinez and Benitez for divided argument is granted. The request for additional time for oral argument is denied.
Jul 9 2004	Application (04A32) to extend further the time for filing the reply brief on the merits in No. 03-7434 from July 16, 2004 to August 2, 2004, submitted to Justice Kennedy.
Jul 11 2004	Further extension of time within which to file respondent's brief on the merits in No. 03-878 to and including August 2, 2004.
Jul 12 2004	Application (04A32) granted by Justice Kennedy extending the time to file the reply brief on the merits to and including August 2, 2004.
Aug 2 2004	Reply of petitioner Daniel Benitez filed.
Aug 3 2004	Record received from U.S.C.A. 11th Circuit. 1 folder)
Aug 5 2004	CIRCULATED.
Aug 12 2004	Record received from U.S.D.C. Northern Dist. of Florida
Aug 24 2004	SET FOR ARGUMENT Wednesday, October 13, 2004.
Oct 8 2004	Letter from the Acting Solicitor General, dated 10/8/04, received. (Distributed).
Oct 13 2004	Argued. For Martinez: Christine S. Dahl, Assistant Federal Defender, Portland, Ore. For Benitez: John S. Mills, Jacksonville, Fla. For United States: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C.

(14)

No. 03-7434 ORIGINAL

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

Supreme Court, U.S.
FILED
OCT 14 2003
OFFICE OF THE CLERK

DANIEL BENITEZ, *Petitioner*

v.

ROBERT A. WALLIS, *Respondent.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court interpreted 8 U.S.C. § 1231(a)(6) to authorize the detention of an alien subject to a removal order, but only for a reasonable period of time until it can be determined whether there is a country to which the alien can be removed. Although § 1231(a)(6) applies to both admitted and non-admitted aliens, the Court emphasized that the aliens at issue in *Zadvydas* had been lawfully admitted and that non-admitted aliens "would present a very different question." This case raises two, independent questions about the applicability of § 1231(a)(6) to non-admitted aliens:

I. Whether the same language in § 1231(a)(6), which does not distinguish in its application between admitted and non-admitted aliens, may be interpreted differently for non-admitted aliens than for admitted aliens;

and, if not,

II. Whether interpreting § 1231(a)(6) to authorize the indefinite detention of a non-admitted alien would raise a constitutional question sufficient to warrant interpreting the statute to avoid the question.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

1. Daniel Benitez, Petitioner.

2. Robert Wallis, in his capacity as Director Immigration and Naturalization Services, Respondent.

3. United States (real party in interest as Respondent).

TABLE OF CONTENTS

Questions Presented ii

List of Parties and Corporate Disclosure Statement iii

Table of Contents iv

Table of Citations vi

Opinions Below 1

Jurisdiction 1

Constitutional Provision and Statute Involved 2

Statement 2

Reasons for Granting the Writ 4

I. Under this Court's Decision in *Zadvydas v. Davis*, 8 U.S.C. § 1231(a)(6) Does Not Authorize the Government to Detain Admitted Aliens Indefinitely. 4

II. The Circuits Are Split on Whether This Court's Interpretation of 8 U.S.C. § 1231(a)(6) Applies to Non-Admitted Aliens 10

A. The Sixth and Ninth Circuits hold that § 1231(a)(6) should be applied to non-admitted aliens in the same manner as admitted aliens. 11

B. The Eleventh Circuit joined the Eighth Circuit in holding that § 1231(a)(6) may be interpreted differently for non-admitted aliens. 14

III. The Circuits Are Split on Whether the Indefinite Detention of a Non-Admitted Alien Raises a Sufficient Question Under the Due Process Clause to Warrant Interpreting 8 U.S.C. § 1231(a)(6) as Not Allowing for the Indefinite Detention of Non-Admitted Aliens 16

A. The Sixth Circuit holds that the indefinite detention of non-admitted aliens is sufficiently suspect to justify the same interpretation of § 1231(a)(6) that this Court reached for admitted aliens 17

B. The Eleventh Circuit joined the Fifth, Seventh, and Eighth Circuits in holding that the indefinite detention of a non-admitted alien does not raise a serious constitutional question. 21

IV. The Court Should Take Review of This Case to Resolve the Circuit Splits. 22

Conclusion 25

Appendices 26

TABLE OF CITATIONS

CASES

Borrero v. Aljets, 325 F.3d 1003 (8th Cir. 2003) 10, 12, 15, 21, 24

Borrero v. Alljets, 178 F. Supp. 2d 1034, 1042 (D. Minn. 2001) ("[W]e can find no sound reason to interpret and apply the statute one way for one category of aliens, but a different way for others."), rev'd, 325 F.3d 1003 (8th Cir. 2003) 12

Brown v. Gardner, 513 U.S. 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994) 11

Chmakov v. Blackman, 266 F.3d 210 (3d Cir. 2001) 12, 24

Foucha v. Louisiana, 504 U.S. 71 (1992) 19

Hoyte-Mesa v. Ashcroft, 272 F.3d 989 (7th Cir. 2001), cert. denied, __ U.S. __, 123 S. Ct. 185 (2002) 10, 21

Jackson v. Indiana, 406 U.S. 715 (1972) 19

Kansas v. Hendricks, 521 U.S. 346 (1997) 19

Kaplan v. Tod, 267 U.S. 228 (1925) 8

Landon v. Palencia, 459 U.S. 21 (1982) 18

Leng May Ma v. Barber, 357 U.S. 185 (1958) 7

Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987) 18

Mathews v. Diaz, 426 U.S. 67 (1976) 17

Plyler v. Doe, 457 U.S. 202 (1982) 17

Rios v. I.N.S., 324 F.3d 296 (5th Cir. 2003) 10, 21

Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003) (en banc), cert. denied, __ U.S. __, 123 S. Ct. 2607 (U.S. 2003) 10, 11, 13, 17, 18, 19, 20, 22, 23, 24

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 7, 8, 9, 19, 20, 21

United States v. Salerno, 481 U.S. 739 (1987) 19

Xi v. I.N.S., 298 F.3d 832 (9th Cir. 2002) 10, 11, 12, 13, 14, 15, 21, 24

Zadvydas v. Davis, 533 U.S. 678 (2001) 5, 7, 8, 10, 11, 13, 14, 15, 17, 18, 19, 20, 21, 23, 24

CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1254 1

28 U.S.C. § 2241 3

8 U.S.C. § 1182 ..... 2, 5, 17

8 U.S.C. § 1231 ..... passim

LAW REVIEW ARTICLES

116 Harv. L. Rev. 1868 (2003) 7, 10

28 N.C. J. Int'l L. & Com. Reg. 567 (2003) 10

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

DANIEL BENITEZ, *Petitioner*

v.

ROBERT A. WALLIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-26a) is reported at 337 F.3d 1289. Neither the opinion of the United States District Court for the Northern District of Florida (App., *infra*, 27a-31a) nor the recommended order of the United States Magistrate Judge (App., *infra*, 32a-37a) are reported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its opinion on July 17, 2003. (App. , *infra*, 1a-26a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides, in relevant part, "No person shall be . . . deprived of . . . liberty . . . without due process of law."

2. Section 241(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6) (2001), provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

STATEMENT

Petitioner, Daniel Benitez, is a Cuban citizen who came to the United States in 1980 from the port of Mariel, Cuba. (App. , *infra*, 2a.) He was paroled into the United States, pursuant to § 212(d)(5) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(d)(5) (1980), but has never been formally admitted into the country. (App. , *infra*, 2a.)

In 1983, Mr. Benitez was convicted of second-degree grand theft and was convicted again ten years later of armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery, and unlawful

possession, sale or delivery of a firearm with an altered or removed serial number. (App. A, *infra*, 4a.)

While he was serving his state prison sentence for the 1993 convictions, the Immigration and Naturalization Service ("INS") revoked Mr. Benitez's parole pursuant to 8 C.F.R. § 212.5(d)(2). (App., *infra*, 4a.) In 1994, the INS found Mr. Benitez to be excludable and ordered his deportation due to his criminal convictions. (App., *infra*, 4a.)

In 2001, Mr. Benitez was released from his Florida prison sentence into INS custody. (App., *infra*, 5a.) After neither being removed from the United States nor released, Mr. Benitez filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Northern District of Florida. (App., *infra*, 6a.) At no point in these proceedings has the Respondent suggested that Mr. Benitez could be returned to Cuba or removed to any other country in the reasonably foreseeable future. (App., *infra*, 8a n. 12.)

In his § 2241 petition, Mr. Benitez contended that he was being detained unlawfully. (App., *infra*, 7a.) The Respondent justified Mr. Benitez's detention pursuant to section 241(a)(6) of the INA, 8 U.S.C. § 1231(a)(6) (2001) (as amended). (App., *infra*, 8a-9a n.13.)

Consistent with a recommended order of the magistrate judge (App., *infra*, 32a-37a), the district court denied Mr. Benitez's § 2241 petition. (App., *infra*, 27a-

31a.) Mr. Benitez appealed the decision to the United States Court of Appeals for the Eleventh Circuit. On July 17, 2003, the Eleventh Circuit issued a detailed opinion affirming the district court's decision. (App., *infra*, 1a-31a.)

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari to review the Eleventh Circuit's decision because that decision conflicts with decisions of other circuit courts of appeals on two important questions regarding the indefinite detention of Mariel Cubans and other non-admitted aliens that the United States is unable to remove. First, in light of this Court's recent determination that § 1231(a)(6) does not authorize indefinite detention of admitted aliens, can this provision be interpreted to authorize the indefinite detention of non-admitted aliens even though the statute itself makes no distinction between admitted and non-admitted aliens? Second, if the statute can be interpreted differently, does the indefinite detention of a non-admitted alien raise a serious constitutional question? To understand the nature of these two circuit splits, one must first understand the relevant statute and this Court's recent opinion interpreting it.

I. UNDER THIS COURT'S DECISION IN *ZADVYDAS V. DAVIS*, 8 U.S.C. § 1231(A)(6) DOES NOT AUTHORIZE THE GOVERNMENT TO DETAIN ADMITTED ALIENS INDEFINITELY.

This case depends on the proper interpretation of the following statutory language:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to the terms of supervision in paragraph (3).

§ 241(a)(6) of the INA, 8 U.S.C. § 1231(a)(6) (2001) (emphasis added). The parties agree that Mr. Benitez is inadmissible under 8 U.S.C. § 1182 and that the ninety-day removal period provided in 8 U.S.C. § 1231(a) has expired. The sole question is whether the language "may be detained beyond the removal period" authorizes indefinite detention or detention only for a reasonable period of time to determine whether removal may be effected.

This Court adopted the latter interpretation in *Zadvydas v. Davis*, 533 U.S. 678 (2002). In that case, the Court held that an interpretation of § 1231(a)(6) to allow indefinite detention "would raise a serious constitutional problem." *Id* at 690. The Court noted that the government may detain a person consistent with the Due Process Clause of the Fifth Amendment only "in a criminal proceeding with adequate procedural protections" or "in certain special and 'narrow' nonpunitive 'circumstances' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.' " *Id.* (citations omitted)).

The Court recognized and rejected two potential special justifications offered by the Government in support of indefinite detention of aliens: (1) ensuring that the alien will appear once removal is possible and (2) preventing danger to the community. *Id.* The Court held that the flight-risk justification was "weak or nonexistent" in cases where there is no reasonable likelihood that the alien's country will accept him back. *Id.* The Court rejected the second justification because it was not sufficiently narrow. *Id.* at 691 ("The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations." (citations omitted)).

Although the Court acknowledged that there are administrative proceedings available to allow release where the alien "bears the burden of proving he is not dangerous," it suggested that "greater procedural protections" may be required. *Id.* at 692. The Court concluded:

> The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.

Id.

The Court also rejected the Government's argument that "from a constitutional perspective, alien status itself can justify indefinite detention" under

the Court's earlier decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) ("*Mezei*"). *Id.* It noted that the parties had briefed the issue of whether "subsequent developments have undermined *Mezei*'s legal authority," *id.* at 694, but it declined to address this issue because *Mezei* was distinguishable. *Id.* at 693.

The distinction was based on the "entry fiction" that has been developed in immigration law. *See id.* at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."); *see generally* Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?*, 116 Harv. L. Rev. 1868, 1871-74 (2003). Generally speaking, an alien who has entered the United States, legally or illegally, obtains a level of protection by the United States Constitution while he is in the country. *See Zadvydas*, 533 at 693. (noting that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.") Such aliens are sometimes referred to as "deportable" or "admitted" aliens.

However, when the Government intercepts an alien attempting to enter the United States and detains him without formally admitting him, the alien is deemed to have never entered the country, even if he is paroled into the country pending his repatriation. *See Leng May Ma v. Barber*, 357 U.S. 185, 188-190 (1958)

(holding that an alien "paroled" into the United States pending admissibility had not effected an "entry"); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (holding that even if present in the United States for several years, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States"). These aliens are sometimes referred to as "excludable" or "non-admitted." Non-admitted aliens, though lawfully present in the country, do not have the same constitutional protections as an admitted alien. *See Mezei*, 345 U.S. at 212 ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' ")

The petitioner in *Mezei* had once been legally admitted into the United States, but he had left the country losing his status as an admitted alien. *Id.* at 692. When he returned, the Government denied him admission and took him into custody indefinitely. *Id.* The *Mezei* court held that this indefinite detention did not violate the Constitution. *Id.*

The *Zadvydas* Court noted that the status of the aliens in *Zadvydas* was an important distinction that rendered *Mezei* inapplicable:

> We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question.

Id. at 682; *see also id.* at 693 (referring to this as a difference "in a critical respect" between *Zadvydas* and *Mezei*). Thus, because the aliens in *Zadvydas* had been admitted into the United States, the Court did not need to consider whether *Mezei* remains good law.

The Court ultimately concluded that an admitted "alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent." *Id.* at 696. It therefore turned to the issue of whether Congress had clearly intended for § 1231(a)(6) to authorize indefinite detention. After reviewing the language of the statute, provisions of similar statutes, and the history of immigration law in the United States, the Court was unable to find "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed." *Id.* at 697-99.

Based on this analysis, the Court concluded that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. Thus, it held that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

Since this Court's opinion in *Zadvydas*, the lower courts have struggled with the question of whether a different result should obtain for aliens who have never been admitted. The Sixth and Ninth Circuits have held that a non-admitted alien may not be detained indefinitely pursuant to § 1231(a)(6). *See Rosales-Garcia v. Holland*, 322 F.3d 386, 408 (6th Cir. 2003) (*en banc*), *cert. denied*, __ U.S. __, 123 S. Ct. 2607 (U.S. 2003) (No. 02-1464); *Xi v. I.N.S.*, 298 F.3d 832, 837-39 (9th Cir. 2002); *see also* Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?*, 116 Harv. L. Rev. 1868 (2003) (canvassing cases and concluding that *Zadvydas* should govern non-admitted aliens); Edward B. Cole, *What Difference Does It Make Whether You Are Deportable or Excludable? The Supreme Court Refuses To Say*, 28 N.C. J. Int'l L. & Com. Reg. 567, 603 (2003) (same).

In the decision below, the Eleventh Circuit joined the Fifth, Seventh, and Eighth Circuits in holding to the contrary. *See Borrero v. Aljets*, 325 F.3d 1003, 1007 (8th Cir. 2003); *Rios v. I.N.S.*, 324 F.3d 296, 297 (5th Cir. 2003); *Hoyte-Mesa v. Ashcroft*, 272 F.3d 989, 991 (7th Cir. 2001), *cert. denied*, __ U.S. __, 123 S. Ct. 185 (2002).

II. THE CIRCUITS ARE SPLIT ON WHETHER THIS COURT'S INTERPRETATION OF 8 U.S.C. § 1231(A)(6) APPLIES TO NON-ADMITTED ALIENS.

The primary issue argued below was whether this Court's interpretation of § 1231 in *Zadvydas* controls. Consistent with the holdings of the Sixth and Ninth Circuits, Mr. Benitez contended that § 1231(a)(6) cannot have one interpretation for admitted aliens and a different interpretation for non-admitted aliens. In rejecting this argument, the Eleventh Circuit created an even two-two circuit split by joining the Eighth Circuit regarding the interpretation of this statute.

A. The Sixth and Ninth Circuits hold that § 1231(a)(6) should be applied to non-admitted aliens in the same manner as admitted aliens.

In a six-three *en banc* decision earlier this year, the Sixth Circuit joined the Ninth Circuit in holding that the meaning of the language in § 1231(a)(6) can have but one meaning and that is the interpretation reached by this Court in *Zadvydas*:

> On the basis of the plain language of the provision, we find it difficult to believe that the Supreme Court in *Zadvydas* could interpret § 1231(a)(6) as containing a reasonable limitation for aliens who are removable on grounds of deportability but not for aliens who are removable on grounds of inadmissibility. Section 1231(a)(6) itself does not draw any distinction between the categories of removable aliens; nor would there be any statutory reason to interpret "detained beyond the removal period" differently for aliens who are removable on grounds of inadmissibility and aliens who are removable on grounds of deportability. *See Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994) (discussing presumption that a statutory term retains the same meaning throughout a statute and in particular throughout a provision).

Rosales-Garcia, 322 F.3d at 404-05; *accord Xi*, 298 F.3d at 836 ("The statute, on its face, makes no exceptions for inadmissible aliens. The Supreme Court's

unqualified holding provides that the statute 'does not permit indefinite detention.' "); *see also Borrero v. Alljets*, 325 F.3d 1003, 1009 (8th Cir. 2003) (Henry, J., dissenting) ("[T]here is no credible distinction to be made between the rights conferred to removable and inadmissible aliens in § 1231(a)(6)."); *Borrero v. Alljets*, 178 F. Supp. 2d 1034, 1042 (D. Minn. 2001) ("[W]e can find no sound reason to interpret and apply the statute one way for one category of aliens, but a different way for others."), *rev'd*, 325 F.3d 1003 (8th Cir. 2003).

The Ninth Circuit noted the possibility that this Court might have reached a different interpretation if § 1231(a)(6) only applied to non-admitted aliens, but it concluded that this has no bearing on the issue:

> The government has offered no authority suggesting that a litigant may not take advantage of a statutory interpretation that was guided by the principle of constitutional avoidance when that litigant's case does not present the constitutional problem that prompted the statutory interpretation.

Xi, 298 F.3d at 839; *see also Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001) ("It simply cannot be that the meaning [of a statute] will change depending on the background or pedigree of the petitioner. Were we to so hold, we would render the meaning of any statute as changeable as the currents of the sea, and potentially as cruel and capricious.").

The Sixth and Ninth Circuits also looked to the following language in Justice Kennedy's dissenting opinion (joined by Chief Justice Rehnquist and

Justices Scalia and Thomas) in *Zadvydas* to determine that this Court had considered the implications of its decision to non-admitted aliens:

> The majority's unanchored interpretation ignores another indication that the Attorney General's detention discretion was not limited to [the removal] period. Section 1231(a)(6) permits continued detention not only of removable aliens but also of inadmissible aliens, for instance, those stopped at the border before entry. Congress provides for detention of both categories within the same statutory grant of authority. Accepting the majority's interpretation, then, there are two possibilities, neither of which is sustainable. On the one hand, it may be that the majority's rule applies to both categories of aliens .... On the other hand, the majority's logic might be that inadmissible and removable aliens can be treated differently. *Yet it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility.*

Zadvydas, 533 U.S. at 710 (Kennedy, J., dissenting) (emphasis added), *quoted in Rosales-Garcia*, 322 F.3d at 408 n.27, *and Xi*, 298 F.3d at 836-37; *see also Zadvydas*, 533 U.S. at 705 (Scalia, J., dissenting) ("Congress undoubtedly thought that both groups of aliens – inadmissible aliens at the threshold and criminal aliens under final order of removal – could be constitutionally detained on the same terms, since it provided the authority to detain both groups in the very same statutory provision, see § 1231(a)(6).").

Thus, the Sixth and Ninth Circuits hold that the same language in § 1231(a)(6) cannot be interpreted one way for admitted aliens and another way for non-admitted aliens. As a result, they have refused to limit this Court's holding in *Zadvydas* to admitted aliens.

B. The Eleventh Circuit joined the Eighth Circuit in holding that § 1231(a)(6) may be interpreted differently for non-admitted aliens.

The Eleventh Circuit joined the Eighth Circuit in rejecting Justice Kennedy's proposition that the text of § 1231(a)(6) does not admit of the possibility that it can be interpreted differently for non-admitted and admitted aliens.[1] The Eleventh and Eighth Circuits hold that the *Zadvydas* majority's interpretation of § 1231(a)(6) only applies to aliens formally admitted into the United States.

The Eighth Circuit reached this conclusion with less than a paragraph of analysis:

> Borrero argues that when the Supreme Court narrowly construes a statute to avoid constitutional doubt, that construction applies categorically to all future cases whether or not the circumstances raise the same constitutional questions. Although *Xi v. INS* and *Rosales-Garcia v. Holland*, take this view, we respectfully disagree. We interpret *Zadvydas* as limiting the detention of only those aliens whose detention raises serious constitutional doubt – admitted aliens. *Zadvydas* itself does not mandate uniform application of § 1231(a)(6) to all aliens. Noting that § 1231(a)(6) applies to "terrorists and criminals," the Court stated that "terrorism or other special circumstances" may justify greater deference to Congress and the Executive. In light of the fact that *Zadvydas* expressly distinguished *Mezei* on the grounds that Mezei had not made an entry into the United States, we conclude that *Zadvydas* 's six-month presumption of reasonableness is inapplicable to inadmissible aliens.

Borrero, 325 F.3d at 1007 (citations omitted).

In the opinion below, the Eleventh Circuit adopted this rationale, but went on to analyze the statutory argument in much more detail than did the Eighth Circuit. The court found five additional considerations supporting its decision.

First, it characterized *Zadvydas* as "an as-applied constitutional challenge" that left the statutory scheme "intact with respect to inadmissible aliens who never have been admitted into the United States." (App., *infra*, 22a.) Second, it held, "When a statute has different applications, it is not necessary to say that it is categorically infirm; it is only the constitutionally problematic aspects which are subject to the construction that avoids the problem." (App., *infra*, 23a (quoting *Xi*, 298 F.3d at 841 (Rymer, J., dissenting)).) Third, the court feared that applying *Zadvydas* to non-admitted aliens would "create an unprotected spot in this country's defense of its borders" because the government might "not be able to determine what potential dangers a particular unadmitted alien might pose." (App., *infra*, 23a-24a.) Fourth, the court believed that this Court limited *Zadvydas* to admitted aliens to retain the Attorney General's discretion in the context of non-admitted aliens. (App., *infra*, 24a-25a.) Finally, the court found that the legislative history behind § 1231(a)(6) precluded an interpretation that the Attorney General's

[1] Although the Fifth and Seventh Circuits have held that non-admitted aliens may be detained indefinitely without offending the Constitution, the Eleventh Circuit correctly observed that neither of these courts addressed the statutory argument. (App., *infra*, 20a.) As discussed *infra*, the Fifth and Seventh Circuit only addressed the constitutional issue.

discretion to detain a non-admitted alien indefinitely had been restricted. (App., *infra*, 25a-26a.)

Thus, four circuits have now considered Mr. Benitez's argument regarding the interpretation of § 1231(a)(6), as applied to non-admitted aliens. They have split evenly, creating a solid basis for review by this Court.

III. THE CIRCUITS ARE SPLIT ON WHETHER THE INDEFINITE DETENTION OF A NON-ADMITTED ALIEN RAISES A SUFFICIENT QUESTION UNDER THE DUE PROCESS CLAUSE TO WARRANT INTERPRETING 8 U.S.C. § 1231(A)(6) AS NOT ALLOWING FOR THE INDEFINITE DETENTION OF NON-ADMITTED ALIENS.

Even if the same words in a statute could be interpreted to mean one thing for admitted aliens and another for non-admitted aliens, that only begs the question of whether the statute in this case, § 1231(a)(6), *should* be interpreted differently for non-admitted aliens. Specifically, does the indefinite detention of a non-admitted alien raise a sufficiently serious constitutional question to warrant an interpretation that avoids the question? Again, the circuits are split.

A. The Sixth Circuit holds that the indefinite detention of non-admitted aliens is sufficiently suspect to justify the same interpretation of § 1231(a)(6) that this Court reached for admitted aliens.

In *Rosales-Garcia*, the *en banc* Sixth Circuit held that the indefinite detention of a non-admitted alien would raise serious constitutional doubts. The Court began by recognizing that any alien physically in this country, even if never formally admitted, is protected to some extent by the Due Process Clause, which by its plain language applies to "all persons." *Rosales-Garcia*, 322 F.3d at 409 (citing *Mathews v. Diaz*, 426 U.S. 67, 75 n.7, 77 (1976) (holding that Cuban aliens paroled pursuant to § 1182(d)(5) are entitled to constitutional protection), and *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.")). Thus, the court reasoned, "While we respect the historic tradition of the 'entry fiction,' we do not believe it applies to deprive aliens living in the United States of their status as 'persons' for the purposes of constitutional due process." *Id.* at 409.

The Sixth Circuit went on to conclude that under this Court's precedents, non-admitted aliens are entitled to less *procedural* due process, but not less *substantive* due process than admitted aliens. *Id.* at 409 & n.28 (citing *Zadvydas*,

533 U.S. at 704 (Scalia, J., dissenting) and *Landon v. Palencia*, 459 U.S. 21, 32 (1982)). The court reasoned:

> The fact that excludable aliens are entitled to less process, however, does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. If excludable aliens were not protected by even the substantive component of constitutional due process, as the government appears to argue, we do not see why the United States government could not torture or summarily execute them. Because we do not believe that our Constitution could permit persons living in the United States – whether they can be admitted for permanent residence or not – to be subjected to *any* government action without limit, we conclude that government treatment of excludable aliens *must* implicate the Due Process Clause of the Fifth Amendment.

Rosales-Garcia, 322 F.3d at 410; *see also Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) ("The 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within the United States to humane treatment." (footnote omitted))

The Sixth Circuit, therefore, found that the dispositive question is whether a person's interest in not being detained indefinitely implicates a substantive due process right or a procedural one. *Rosales-Garcia*, 322 F.3d at 410-11 (developing this dichotomy with respect to indefinite detention). In answering this question, the court focused on the following language from *Zadvydas*:

> A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "deprive" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections or, in special and "narrow" nonpunitive "circumstances" where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint."

Zadvydas, 533 U.S. at 690 (citations omitted)

The Sixth Circuit interpreted this language to mean that "government detention violates a person's substantive due process rights unless such detention is" the result of criminal proceedings or the "narrow nonpunitive circumstances" referenced in *Zadvydas*. *Rosales-Garcia*, 322 F.3d at 411.

The court specifically found that *Mezei* is no longer good law to the extent it supports the indefinite detention of a non-admitted alien:

> [W]e believe that the Court's implicit conclusion in *Mezei* is eclipsed by the conclusion drawn from the *Salerno* line of cases that the indefinite detention of excludable aliens does raise constitutional concerns. All of the cases that the *Zadvydas* Court relied on in assessing the constitutional due process concerns implicated by the indefinite detention of aliens who are removable on grounds of deportability were decided after *Mezei*. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *Jackson v. Indiana*, 406 U.S. 715 (1972). In these cases, the contours of constitutionally permissible civil detention are rigorously delineated – a substantial jurisprudential development from the time that *Mezei* was decided. As we explained above, the *Zadvydas* Court held on the

> basis of these cases that civil detention is constitutionally permissible only "in certain special and narrow non-punitive circumstances where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690. As we also explained above, we do not believe that any such special circumstances outweigh [the non-admitted petitioners'] interest in avoiding indefinite and potentially permanent INS detention. Although we must – as a lower federal court – apply all pertinent Supreme Court precedent, it is not our role to reconcile cases whose application leads to opposite conclusions. Therefore, to the extent that we could conclude, in reliance on the Court's holding in *Mezei*, that the indefinite detention of excludable aliens is constitutionally permissible, we believe such a conclusion to be fatally undermined by the Court's later decisions in the *Salerno* line of cases.

Rosales-Garcia, 322 F.3d at 414-15 (footnote omitted).

The court also held that *Mezei* was distinguishable on its facts because "the *Mezei* Court explicitly grounded its decision in the special circumstances of a national emergency and the determination by the Attorney General that Mezei presented a threat to national security." *Rosales-Garcia*, 322 F.3d at 413-14.

The Sixth Circuit ultimately held that it is at least a serious question whether the Constitution permits the government to lock a non-admitted alien in prison for the rest of his life because his home country will not take him back. Therefore, it applied the avoidance doctrine invoked in *Zadvydas* to hold that § 1231(a)(6) must be interpreted to allow continued detention only for so long as is reasonable to attempt to effect removal.

B. The Eleventh Circuit joined the Fifth, Seventh, and Eighth Circuits in holding that the indefinite detention of a non-admitted alien does not raise a serious constitutional question.

The Eleventh Circuit, on the other hand, found that the indefinite detention of a non-admitted alien raises no constitutional questions because, it concluded, *Mezei* was controlling. (App., *infra*, 17a-19a.) In so holding, the court joined the Fifth, Seventh and Eighth Circuits in applying *Mezei*. *See Borrero*, 325 F.3d at 1007-08; *Rios*, 324 F.3d at 297; *Hoyte-Mesa*, 272 F.3d at 991.[2] These courts declined to distinguish *Mezei* and concluded that, in the absence of more clear direction from this Court, they were bound by *Mezei*.

As this Court noted in *Zadvydas*, there is substantial debate as to the continuing validity and correctness of *Mezei*, especially in light of this Court's recent jurisprudence regarding the substantive due process right to be free from indefinite detention. The Court left this important question for another day in *Zadvydas* because that case was readily distinguishable. The subsequent circuit court decisions have now framed this important issue of constitutional law for this Court's consideration.

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[2] The Ninth Circuit declined to address the constitutional issue in *Xi* and rested its decision on the statutory issue. *Xi*, 298 F.3d at 840 (Gould, J., concurring).

IV. THE COURT SHOULD TAKE REVIEW OF THIS CASE TO RESOLVE THE CIRCUIT SPLITS.

The legality of the indefinite detention of non-admitted aliens literally affects thousands of people in this country. In its Petition for a Writ of Certiorari in *Rosales-Garcia*, the Government reported that the Bureau of Immigration and Customs Enforcements of the Department of Homeland Security (formerly, the INS) is detaining over 2000 non-admitted aliens. More than half of these aliens, including over 900 Mariel Cubans, have been detained for more than six months. (*See* Pet. for Cert., Case No. 02-1464, at 27-28.) The Government shuttles these detainees from prison to prison, often across circuit lines. For example, Mr. Benitez has been transferred from Florida in the Eleventh Circuit, where he was detained at the time he filed his petition for a writ of habeas corpus, to Indiana in the Seventh Circuit.

Not only do the issues in this case affect thousands of people, the effect on their lives is profound. They face the very real possibility of spending the rest of their lives incarcerated, not because of any crimes they may have committed, but because their countries will not take them back. Whether they have a right to be released under strict supervision or must suffer a life sentence depends, at the moment, on where they are detained. Thus, non-admitted aliens in Los Angeles, San Diego, Phoenix, Detroit, and Cleveland, for example, may not be detained

indefinitely, while those in Miami, Atlanta, Houston, New Orleans, Chicago, St. Louis, and Minneapolis are subject to indefinite detention at the whim of the Government.

If the splits are not resolved, they will likely have a substantial impact on the distribution of non-admitted aliens throughout the United States. Those who are not being detained have a strong incentive to reside in the Sixth or Ninth Circuits. The Government, on the other hand, will have an incentive to imprison detainees in states in the Fifth, Seventh, Eighth and Eleventh Circuits and move incarcerated detainees from the Sixth and Ninth Circuits. The states, who often house the detainees in state prisons under contract with the United States, should not have to bear such disparate burdens.

While this Court denied certiorari to review *Rosales-Garcia*, the split on the main issue – the proper interpretation of § 1231(a)(6) – was not developed at the time. While the Sixth and Ninth Circuits had developed their statutory analysis in favor of applying *Zadvydas* to non-admitted aliens, only the Eighth Circuit had engaged in the statutory analysis and reached a contrary result, and that court's analysis covered only a single paragraph. Now that the Eleventh Circuit has provided a detailed statutory analysis limiting *Zadvydas* to admitted aliens, further decisions by the remaining courts of appeals are unlikely to plow new ground.

Indeed, the eighteen federal appellate judges who have considered the issue are equally divided at nine to nine.[3]

Moreover, this issue of statutory interpretation raises implications far beyond immigration law. Other than the dissenting opinion of Judge Rymer in *Xi*, the Eleventh Circuit cited no authority for the proposition that the same language of a statute may be construed one way to avoid a constitutional question regarding one class of persons, but be construed in the opposite way for persons who do not raise the same question. *But cf. Chmakov*, 266 F.3d at 215 (rejecting this proposition in interpreting another statute and characterizing the proposition as "cruel and capricious").

Finally, it is important to note that there have never been any allegations that Mr. Benitez has had any involvement in terrorism or foreign conflict. The detention of aliens who are suspected of terrorism or who have been designated as "enemy combatants" is not an issue in this case. As this Court noted in *Zadvydas*, such cases may provide additional justifications for detention not present in cases such as this. 533 U.S. at 691 ("The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected

[3] Six circuit judges in *Rosales-Garcia*, two in *Xi*, and one in *Borrero* voted in favor of applying this Court's interpretation of § 1231(a)(6) in *Zadvydas* to non-admitted aliens. The three Eleventh Circuit judges below joined three in *Rosales-Garcia*, two in *Borrero*, and one in *Xi* in interpreting § 1231(a)(6) differently for non-admitted aliens.

terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations." (citations omitted)). Thus, any need for the law to develop in the circuit courts regarding post-September 11 detention issues does not in any way militate against the need for immediate review of Mr. Benitez's continued imprisonment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted so the Court can resolve these two important issues on which the circuits are split.

Respectfully Submitted,

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OCTOBER, 2003

APPENDICES

A. Opinion of United States Court of Appeals for the Eleventh Circuit (July 17, 2003) 1a

B. Opinion of United States District Court for the Northern District of Florida (June 11, 2002) 27a

C. Report and Recommendation of United States Magistrate Judge (April 8, 2003) 32a

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JULY 17, 2003
THOMAS K. KAHN
CLERK

No. 02-14324

D. C. Docket No. 02-00019-CV-5-19-MMP

DANIEL BENITEZ,

Petitioner-Appellant,

versus

ROBERT WALLIS, Director INS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(July 17, 2003)

Before DUBINA, BLACK and HULL, Circuit Judges.

PER CURIAM:

Daniel Benitez, a native and citizen of Cuba, is an inadmissible alien who brought this § 2241 petition challenging his indefinite detention. The district court concluded that the INS's determinations that Benitez posed a danger to the community and was likely to engage in further violent behavior were facially

legitimate and bona fide reasons to detain Benitez until removal to Cuba is possible. Consequently, the district court denied Benitez's § 2241 petition. After review and oral argument, we affirm.

I. BACKGROUND

In 1980, Daniel Benitez attempted entry into the United States from the port of Mariel, Cuba and, in effect, was stopped at the border.[1] Benitez then was paroled into the United States pursuant to § 212(d)(5) of the Immigration and Nationality Act ("INA"). See 8 U.S.C. § 1182(d)(5). Under § 1182(d)(5), the Attorney General may "in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. § 1182(d)(5).

In 1983, Benitez was convicted in Dade County, Florida, of second degree grand theft, see Fla. Stat. § 812.014, and was sentenced to three years' probation.

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[1]Over the past twenty-five years,

> Castro has unleashed massive waves of refugees on the United States to release the pressure of internal dissent. In the Mariel boat-lift of 1980, Castro let some 125,000 Cubans flee to the United States. Many of these refugees were dissidents, criminals or mental patients. In the summer of 1994, facing increasing hostility to his regime and open defiance of the Communist Party, Castro allowed over 50,000 refugees to flee to the United States on make-shift rafts. After the exodus of 1994, Castro threatened to unleash another wave of refugees in the spring of 1995 in an effort to discourage passage of the Helms-Burton Act . . . .

C. Todd Piczak, The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the GATT and the Political Doctrine, 61 U. Pitt. L. Rev 287, 312-13 (Fall 1999).

Sometime thereafter, Benitez submitted an application to adjust his status to that of a lawful permanent resident. Under applicable immigration laws, Cuban refugees may apply for permanent resident status once they: (1) have been paroled into the United States; (2) have been physically present in the United States for one year; and (3) are eligible to receive an immigrant visa and are admissible to the United States for permanent residence. See 8 U.S.C. § 1255.[2]

Under the provisions of § 212(a) of the INA, certain classes of aliens are ineligible to receive an immigrant visa and are not admissible to the United States for permanent residence, and thus fail to meet the third condition outlined above. See 8 U.S.C. § 1182(a). One such class includes "[a]liens who have been convicted of a crime involving moral turpitude." 8 U.S.C. § 1182(a)(9) (1983). In 1985, Benitez's application for permanent resident status was denied because his criminal conviction for grand theft was a crime involving moral turpitude.[3]

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[2]Section one of the Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161, as amended 8 U.S.C. § 1255, historical and statutory notes, provides:

> That, notwithstanding the provisions of Section 245(c) of the Immigration and Nationality Act, ... the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959, and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

[3]A second application for adjustment of status filed by Benitez was denied in 1990 for lack of prosecution.

In 1993, Benitez pled guilty to a multi-count criminal indictment in Florida state court. Specifically, Benitez pled guilty to armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery, and unlawful possession, sale or delivery of a firearm with an altered or removed serial number. The state court sentenced Benitez to 20 years' imprisonment.

Based on his 1993 criminal convictions in Florida, the INS determined that Benitez's continued immigration parole was against the public interest. Pursuant to 8 C.F.R. § 212.5(d)(2), the INS revoked Benitez's immigration parole.[4]

Benitez then was ordered to appear before an immigration judge "to determine whether he should be excluded and deported." The notice informed Benitez that he had a right to counsel and to have a friend or relative present at the hearing. In 1994, Benitez was found excludable and deportable to Cuba because of his criminal convictions in Florida.[5]

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[4]According to § 212.5(d)(2), "when in the opinion of the district director in charge of the area in which the alien is located neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status which he or she had at the time of parole." 8 C.F.R. § 212.5(d)(2) (1993).

[5]In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). See Pub. L. No. 104-208, 110 Stat. 3009, 3009-546 (1996). IIRIRA made comprehensive changes to the Immigration and Nationality Act (INA), including changes in immigration terminology. See generally Assa'ad v. United States Atty. Gen., 332 F.3d 1321, 1326-27 (11th Cir. 2003). Previously, individuals who were ineligible for admission to the United States were referred to as "excludable," while those who had gained admission were referred to as "deportable." See 8 U.S.C. §§ 1182, 1251 (1994). Excludable aliens are now referred to as "inadmissible" aliens. See 8 U.S.C. § 1182. Additionally, the amended INA now uses the term "removal proceedings" to refer to the proceedings applicable to both inadmissible and deportable aliens. See 8 U.S.C. § 1229a. For the purposes of this opinion, we use the terms excludable, inadmissable, and unadmitted interchangeably. We do so not to suggest that these terms under immigration laws will always have the exact same legal meaning, but rather because these terms as applied to Benitez are without any substantive difference. Benitez is excludable under the prior version of the INA, inadmissable under IIRIRA, and his immigration parole never constituted a formal admission or entry into the United States.

On October 11, 2001, Benitez was released into INS custody. Benitez's status then was reviewed pursuant to the Cuban Review Plan to determine whether it was in the public interest to release him from INS custody.[6] On November 6, 2001, Benitez appeared before the Cuban Review Panel.[7]

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[6]Before the Cuban Review Panel makes a recommendation that a detainee be granted parole, a majority of the Panel must conclude that: "(i) The detainee is presently a nonviolent person; (ii) The detainee is likely to remain nonviolent; (iii) The detainee is not likely to pose a threat to the community following his release; and (iv) The detainee is not likely to violate the conditions of his parole." 8 C.F.R. § 212.12(d)(2).

The panel also must consider the following factors when determining whether to recommend further detention or release on parole of a detainee: "(i) The nature and number of disciplinary infractions or incident reports received while in custody; (ii) The detainee's past history of criminal behavior; (iii) Any psychiatric and psychological reports pertaining to the detainee's mental health; (iv) Institutional progress relating to participation in work, educational and vocational programs; (v) His ties to the United States, such as the number of close relatives residing lawfully here; (vi) The likelihood that he may abscond, such as from any sponsorship program; and (vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole." 8 C.F.R. § 212.12(d)(3).

[7]According to § 212.12(d)(1),

> The Director shall designate a panel or panels to make parole recommendations to the Associate Commissioner for Enforcement. A Cuban Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by a two-member Panel shall be unanimous. If the vote of a two-member Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Panel member is added. A recommendation by a

On January 11, 2002, Benitez filed this § 2241 petition challenging his indefinite detention by the INS. On January 17, 2002, Benitez received a Notice of Releaseability, in which a Cuban Review Panel concluded that Benitez was releaseable under the criteria established by the Cuban Review Plan at such time as the INS determined that a suitable sponsorship to a half-way house could be arranged.[8] See 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.12 (2002) (Parole determinations and revocations respecting Mariel Cubans). On March 10, 2003, Benitez's Notice of Releaseability was revoked because the INS concluded, without a hearing, that Benitez was involved in a planned jail escape. See 8 C.F.R. § 212.12(e).[9] Therefore, Benitez's current detention results not only from his inadmissible alien status, but also from his violations of the conditions of his earlier immigration parole and the INS's determination that he has not refrained from criminal conduct while in custody.[10]

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three-member Panel shall be by majority vote. The third member of any Panel shall be the Director of the Cuban Review Plan or his designee.
8 C.F.R. § 212.12(d)(1).

[8]Although the Notice was served/delivered on January 17, 2002, it is dated December 13, 2001.

[9]Benitez disputes his involvement in the planned jail escape. This issue, however, is not before this Court.

[10]Mariel Cubans who are being detained have their cases reviewed every year to determine whether they should be paroled. See 8 C.F.R. § 212.12(g)(2). There is no claim on appeal before this Court that Benitez has not received annual consideration for immigration parole in accordance with the Cuban Review Plan. Inadmissable aliens other than Mariel Cubans are considered for parole under similar procedures. See 8 C.F.R. § 241.4.

Benitez, proceeding pro se before the district court, asserted that his indefinite detention was unconstitutional in light of the Supreme Court's decision in Zadvydas v. Davis, 533 U.S. 678 (2001). According to the district court, the fact that Benitez was a "non-admitted parolee" made Zadvydas inapplicable because Zadvydas limited its holding to resident aliens. The district court concluded that the INS reasonably determined that Benitez was a danger to the community and was likely to engage in future criminal conduct. The district court further concluded that these determinations warranted Benitez's detention until he could be removed to Cuba. Finding no constitutional or statutory prohibition against Benitez's indefinite detention, the district court denied Benitez's § 2241 petition. Benitez timely appealed, and this Court, in its discretion, appointed counsel to represent Benitez on appeal.

II. DISCUSSION

Benitez does not challenge the fact that he (1) attempted to enter illegally the United States, (2) never formally has been admitted into this country, and (3) is properly subject to removal. Instead, Benitez filed his § 2241 petition arguing only that his indefinite detention is impermissible given the Supreme Court's

decision in Zadvydas.[11] On appeal, Benitez asserts that his indefinite detention violates both the United States Constitution and federal law.[12]

The INS continues to detain Benitez pursuant to 8 U.S.C. § 1231(a)(6). Thus, we first discuss § 1231(a)(6) and how the Supreme Court interpreted § 1231(a)(6) in Zadvydas. We then analyze the legal issues presented in Benitez's appeal.

A. 8 U.S.C. § 1231(a)(6)

After an alien, such as Benitez, is ordered removed from the United States, the Attorney General must attempt to secure the alien's removal within 90 days. See 8 U.S.C. § 1231(a)(1) (the "removal period").[13] "Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible . . . ." 8 U.S.C. § 1231(a)(2). Congress, however, recognized that securing an alien's actual removal within 90 days is not always possible. Consequently, § 1231(a)(6) expressly authorizes the Attorney General to detain aliens beyond the 90-day removal period, as follows:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable [for violations of nonimmigrant status or entry conditions, violations of criminal laws, or threatening national security] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6).

B. Zadvydas

In Zadvydas, the Supreme Court expressly addressed whether the government's authority under § 1231(a)(6) to detain two legal permanent residents beyond the 90-day removal period allowed the government to detain them indefinitely. The two legal permanent residents were ordered removed based on

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[11]The Supreme Court has determined that habeas jurisdiction under § 2241 for cases involving aliens was not repealed by ADEPA or IIRIRA. See INS v. St. Cyr, 533 U.S. 289, 314 (2001); see also Zadvydas, 533 U.S. at 688 (concluding that "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention").

[12]The government does not contend that repatriation by Cuba of Benitez is reasonably foreseeable. Thus, we accept Benitez's claim that he, at present, is subject to indefinite detention.

[13]In its response brief on appeal, the government asserts that pre-IIRIRA rules govern Benitez's indefinite detention. However, in the district court proceedings, the government relied on IIRIRA, did not assert that pre-IIRIRA rules applied, and did not dispute (in any way) the district court's application of IIRIRA. Therefore, the issue of whether IIRIRA applies to Benitez's claims has been waived by the government in this particular case. See Onishea v. Hopper, 171 F.3d 1289, 1305 (11th Cir. 1999) (en banc); Depree v. Thomas, 946 F.2d 784, 793 (11th Cir. 1991). Consequently, we apply IIRIRA to this case, but note that IIRIRA's application in Benitez's case is not free from doubt because the deportation proceedings against Benitez commenced in 1993 and Benitez's final deportation order was entered in 1994, both events well prior to IIRIRA. See Rosales-Garc[illegible] v. Holland, 322 F.3d 386, 401-03 (6th Cir. 2003) (en banc) (discussing which statute to apply), cert. denied, 71 U.S.L.W. 3652, 3787, 3789 (U.S. June 23, 2003) (No. 02-1464); cf Akinwale v. Ashcroft, 287 F.3d 1050, 1052 n.2 (11th Cir. 2002) (applying IIRIRA to an indefinite detention claim where deportation proceedings commenced in 1995, prior to IIRIRA, but the final order of deportation was entered on October 3, 1997, after IIRIRA); see also Alanis-Bustamante v. Reno, 201 F.3d 1303, 1306-07 (11th Cir. 2000) (discussing how Congress divided deportation proceedings into three categories). Thus, we expressly do not address whether Benitez's indefinite detention claims in his § 2241 petition should be tied to his 1994 deportation order and governed by pre-IIRIRA law or whether IIRIRA applies because Benitez is not challenging his 1994 deportation order but only the length of his detention pursuant to that order.

criminal convictions. The government, however, could not effectuate their removal because no country would accept them.

Specifically, Kestutis Zadvydas was a legal permanent resident alien of Lithuanian decent, who was born in a displaced persons camp in Germany in 1948. Zadvydas, 533 U.S. at 684. Zadvydas had a long criminal history and also a long history of flight, both in his criminal proceedings and his deportation proceedings. Id. In 1992, Zadvydas was convicted of possession with intent to distribute cocaine and was sentenced to 16 years' imprisonment in state prison. Id. After only two years' imprisonment, he was released into INS custody and ordered deported to Germany. Id.

Germany, however, refused to accept Zadvydas because he was not a German citizen. Id. Next, the INS attempted to deport Zadvydas to Lithuania. Id. Lithuania refused to accept Zadvydas because he was not a citizen or a permanent resident of Lithuania. Id. The INS also tried unsuccessfully to deport Zadvydas to the Dominican Republic (Zadvydas's wife's country). Id.[14]

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[14]The district court ordered Zadvydas released under supervision because it believed that "the Government would never succeed in its efforts to remove Zadvydas from the United States, leading to his permanent confinement, contrary to the Constitution." Zadvydas, 533 U.S. at 685. The Fifth Circuit reversed, concluding "that Zadvydas' detention did not violate the Constitution because eventual deportation was not 'impossible,' good-faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review." Id.; see also Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999).

In Zadvydas, the Supreme Court also considered the case of Kim Ho Ma. Id. at 685. Ma was born in Cambodia, but fled to the United States at an early age. Id. In 1995, Ma was convicted of manslaughter and was sentenced to 38 months' imprisonment. Id. After two years' imprisonment, he was released into INS custody and ordered removed. Id. The United States, however, has no repatriation treaty with Cambodia. Id. at 686. Having no place to send Ma, the INS kept him in custody because "it was unable to conclude that Mr. Ma would remain nonviolent and not violate the conditions of release." Id. at 685-86 (internal quotation marks omitted).[15]

In evaluating indefinite detention in Zadvydas, the Supreme Court considered whether indefinite detention of resident aliens, if authorized by § 1231(a)(6) as the government contended, would present constitutional problems. The Supreme Court acknowledged that the two resident alien petitioners in Zadvydas enjoyed certain constitutional privileges associated with individuals who have gained entry into the United States. Id. at 693.

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[15]In the district court, more than one hundred habeas corpus petitioners, like Ma, challenged their ongoing detention by the INS. The district court designated five lead cases that presented issues common to all petitioners and directed the parties to brief and argue those issues before five district court judges. The five district court judges issued a joint order establishing a legal framework to apply in each individual case. The five-judge panel determined that the Constitution forbids post-removal detention unless there is a realistic chance that the alien will be deported. The panel further concluded that because there was no repatriation agreement with Cambodia, there was no realistic chance that Ma and the others would be deported. A single judge then applied this ruling to Ma and held that he should be released. The Ninth Circuit affirmed Ma's release for essentially the same reasons as outlined by the panel of five judges. See Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000).

In Zadvydas, the Supreme Court also explained that Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), permits the indefinite detention of unadmitted aliens whom the government is unable to return anywhere else, but noted that Mezei "differs from the present cases [in Zadvydas] in a critical respect." Zadvydas, 533 U.S. at 693. The critical difference is that the alien in Mezei was "treated, for constitutional purposes, as if stopped at the border." Zadvydas, 533 U.S. at 693 (internal citations omitted). According to the Supreme Court in Zadvydas, "that made all the difference" in its earlier decision that Mezei's indefinite detention did not violate the Constitution. Id.

In Zadvydas, the Supreme Court further stressed that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." 533 U.S. at 693. The Supreme Court also emphasized that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." Id. (citations omitted). "But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." Id. (citations omitted).

After an extended discussion of the serious constitutional problems of permitting the indefinite detention of legal permanent residents as opposed to unadmitted aliens, the Supreme Court in Zadvydas saved § 1231(a)(6) from unconstitutionality in the context of a resident alien by limiting the post-removal-period detention to a length of time reasonably necessary to bring about the actual removal of the resident alien. Id. at 694-99. The Supreme Court then recognized six months as a presumptively reasonable time of post-removal-period detention for resident aliens. Id. at 699-702.

C. Circuit Split Post-Zadvydas

A circuit split has developed as to whether Zadvydas limits only the government's authority to detain resident aliens or whether Zadvydas applies to all categories of aliens. Compare Borrero v. Aljets, 325 F.3d 1003, 1007 (8th Cir. 2003) (concluding "that Zadvydas's six-month presumption of reasonableness is inapplicable to inadmissible aliens"); Rios v. I.N.S., 324 F.3d 296, 297 (5th Cir. 2003) (concluding that Zadvydas "distinguished the status of deportable aliens from that of excludable aliens"); Hoyte-Mesa v. Ashcroft, 272 F.3d 989, 991 (7th Cir. 2001) (concluding that an inadmissible alien's "continued detention does not violate due process"), cert. denied, 123 S. Ct. 185 (2002); with Rosales-Garcia v. Holland, 322 F.3d 386, 408 (6th Cir. 2003) (en banc) (applying the reasonableness limitation that the Supreme Court read into § 1231(a)(6) in Zadvydas to

inadmissible aliens), cert. denied, 71 U.S.L.W. 3652, 3787, 3789 (U.S. June 23, 2003) (No. 02-1464); Xi v. I.N.S., 298 F.3d 832, 837-39 (9th Cir. 2002) (same).[16] Although a circuit split exists, the Supreme Court has denied certiorari in cases representing both viewpoints.

This case, however, requires us to join the debate and determine whether unadmitted aliens, post-Zadvydas, may be detained indefinitely under § 1231(a)(6). To do so, we first discuss why Benitez remains an inadmissable alien and then whether inadmissible aliens have a constitutional right to be free from indefinite detention. We then examine whether the reasonableness component, as read into § 1231(a)(6) by the Supreme Court in Zadvydas, applies to inadmissible aliens.

D. Benitez Is an Inadmissible Alien

Because the status of the alien affects the issues herein, we begin by confirming Benitez's alien status. Although Benitez has been present physically

[16]The Sixth Circuit decision in Rosales was the result of an interesting procedural history. The district court denied the petitioner's § 2241 petition. The Sixth Circuit reversed the district court on January 31, 2001, and concluded that the indefinite detention of inadmissible aliens violates the Fifth Amendment. Following Zadvydas, the government petitioned the Supreme Court for certiorari, requesting that the Sixth Circuit's decision be vacated and remanded in light of Zadvydas. The Supreme Court granted the government's motion and vacated and remanded the case for reconsideration in light of Zadvydas. The Sixth Circuit then heard the case on remand en banc and concluded that the Supreme Court's interpretation of § 1231(a)(6) applied to all classes of aliens. The Supreme Court then denied certiorari.

in the United States for more than 20 years, we readily conclude that Benitez never formally has been admitted and remains an inadmissable alien.

As mentioned above, Benitez arrived in the United States as part of the Mariel boat-lift, was stopped at the border, and paroled into this country. He was paroled because Congress has recognized that it is often necessary to permit arriving aliens, such as Benitez, to make a temporary, unofficial entry into the United States pending the resolution of their applications. See Mezei, 345 U.S. at 215; see also 8 U.S.C. § 1225(b) (alien who does not appear to examining immigration officer to be entitled to land may be detained for further inquiry); 8 U.S.C. § 1182(d)(5)(A) (granting authority to the Attorney General to parole aliens seeking admission into the United States, but providing that parole does not constitute an admission of the alien). Furthermore, the Supreme Court has rejected claims that the parole or detention of an unadmitted alien has any effect on the alien's status under the law. See Leng May Ma v. Barber, 357 U.S. 185, 188 (1958).[17] Because an alien's legal status is not altered by detention or parole, it is clear that Benitez is, and remains, an inadmissable alien and is similar to any

[17]In Leng May Ma, the Supreme Court noted that "[f]or over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." 357 U.S. at 188. Likewise, the Supreme Court explained that "[t]he parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status . . . ." Id. at 190; see also Mezei, 345 U.S. at 215 (alien permitted to enter pending a decision on admissibility "is treated as if stopped at the border"). This principle has become known as the "entry doctrine" fiction.

other alien who has not gained entry and is stopped at this country's border. See Jean v. Nelson, 727 F.2d 957, 969-70 (11th Cir. 1984) (en banc).

Any discussion of Benitez's rights in the immigration context must also start with the fundamental difference in the legal status of (1) unadmitted aliens and (2) resident aliens who have effected "entry" into the United States, whether illegally or legally. This critical difference not only was recognized in Zadvydas, but has been a hallmark of immigration law for more than a hundred years. For example, in Leng May Ma, the Supreme Court emphasized that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality." 357 U.S. at 187. The Supreme Court continued that "[i]n the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'" Id. (quoting Mezei, 345 U.S. at 212).

The Supreme Court further has explained that aliens seeking admission, such as Benitez, have no constitutional rights regarding their applications for admission. See Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[A]n alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative . . . . [H]owever, once an alien gains admission to our country and

begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953) ("'excludable' aliens . . . are not within the protection of the Fifth Amendment"); Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("The Bill of Rights is a futile authority for an alien seeking admission for the first time to these shores.").

E. Constitutional Analysis

Against this background, we now examine whether, post-Zadvydas, the indefinite detention of an inadmissable alien, like Benitez, violates the Constitution. As mentioned above, the Supreme Court in Mezei expressly addressed the government's authority to detain indefinitely unadmitted aliens. Mezei had lived in the United States for approximately 25 years. 345 U.S. at 208. He left the United States in 1948, without authorization or reentry papers, and resided in Hungary for 19 months. Id. He then attempted to return to the United States. Id. The United States refused to admit Mezei into the country, and he was detained indefinitely on Ellis Island.

Because Mezei had voluntarily left the country, the Supreme Court had "no difficulty in holding respondent an entrant alien or 'assimilated to [that] status' for constitutional purposes." Mezei, 345 U.S. at 214 (quoting Kwong Hai Chew v. Colding, 344 U.S. 590, 599 (1953)). The Supreme Court also stated that:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.

Mezei, 345 U.S. at 212 (internal citations and quotation marks omitted). The Supreme Court concluded that the unadmitted alien's continued, even indefinite, detention did not deprive him of any statutory or constitutional rights. Id. at 215.

This Court, sitting en banc, also has addressed the constitutional rights of inadmissible aliens in the context of indefinite detention. In Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), this Court considered a group of Haitian aliens who were inadmissible and were being detained at various INS facilities pending a final determination of the merits of their individual asylum claims. After noting "the fundamental distinction between the legal status of excludable or unadmitted aliens and aliens who have succeeded in effecting an 'entry' into the United States," this Court concluded that "[a]liens seeking admission to the United States . . . have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress." Jean, 727 F.2d at 967-68.

This Court then addressed the concerns of the critics of a policy or legal system that allowed for the indefinite detention of aliens. In Jean, this Court noted that

> [s]ome courts and commentators have suggested that when an exercise of the government's power to exclude results in an indefinite detention of an excludable alien, at some point the continued imprisonment becomes punishment, regardless of the legal justifications or fictions involved. These authorities contend that at this juncture the government should be required to make some justification to continue to detain the alien.

Id. at 974. The Jean Court concluded "that we must resist the temptation to tamper with the authority of the Executive by ruling that excludable aliens have constitutional rights [against indefinite detention], even with regard to their applications for parole." Id. at 975.

The Jean decision is based on Mezei. Although Mezei has been criticized heavily by academic commentators, it remains good law. As mentioned above, Mezei is distinguished and preserved, but is not overruled, in Zadvydas. See Zadvydas, 533 U.S. at 693-94. As Mezei remains valid precedent, so does Jean. Consequently, we conclude that inadmissible aliens, like Benitez, have no constitutional rights precluding indefinite detention. See, e.g., Borrero, 325 F.3d at 1007-08; Rios, 324 F.3d at 297; Hoyte-Mesa, 272 F.3d at 991.

F. Statutory Right under § 1231(a)(6)

Although Benitez does not have a constitutional right precluding indefinite detention, we also must consider whether he has a statutory right under § 1231(a)(6), post-Zadvydas, prohibiting indefinite detention. As previously mentioned, a circuit split has developed as to the breadth of Zadvydas's holding.

The Fifth, Seventh, and Eighth Circuits have concluded that Zadvydas does not affect the government's long-standing authority to detain indefinitely unadmitted aliens. Although three circuits have so concluded, the Fifth Circuit in Rios and the Seventh Circuit in Hoyte-Mesa do not engage in any statutory analysis of how § 1231(a)(6) must be read after Zadvydas. Rather, they simply conclude that Zadvydas did not overrule Mezei and, therefore indefinite detention of unadmitted aliens is permissible. This conclusion, however, begs the separate question of statutory construction and whether the Supreme Court's interpretation of § 1231(a)(6) in Zadvydas must now apply uniformly to all types of aliens.

The Eighth Circuit in Borrero specifically does address the statutory issue of whether the Zadvydas Court's statutory construction of § 1231(a)(6) as containing a "reasonableness" component must apply categorically to all aliens, regardless of the alien's legal status. Borrero, 325 F.3d at 1005-07. The Eighth Circuit concluded that Zadvydas's narrowing construction of § 1231(a)(6) does not limit the government's statutory authority to detain unadmitted aliens "[b]ecause the detention of unadmitted aliens does not raise the same constitutional concerns as does the detention of admitted aliens." Id. at 1005. The Eighth Circuit stressed that "[t]he constitutional issue avoided in Zadvydas is simply not present in the context of aliens who have not effected an entry into the United States." Id. at 1007.

20a

In doing so, the Eighth Circuit expressly rejected alien Borrero's argument that the same statutory construction of § 1231(a)(6) must apply "categorically to all future cases whether or not the circumstances raise the same constitutional questions." Borrero, 325 F.3d at 1007. The Eighth Circuit acknowledged that the Ninth and the Sixth Circuits have taken the view that the same construction must apply, but the Eighth Circuit disagreed for several reasons. Id.

First, the Eighth Circuit "interpret[ed] Zadvydas as limiting the detention of only those aliens whose detention raises serious constitutional doubt – admitted aliens." Borrero, 325 F.3d at 1007. Second, the Eighth Circuit emphasized that "Zadvydas itself does not mandate uniform application of § 1231(a)(6) to all aliens." Id. The Eighth Circuit reached this conclusion based, in part, on the Supreme Court's notation that "'terrorism or other special circumstances' may justify greater deference to Congress and the Executive." Id. (quoting Zadvydas, 533 U.S. at 697). Third, the Eighth Circuit stressed how Zadvydas "expressly distinguished Mezei on the grounds that Mezei had not made an entry into the United States." Borrero, 325 F.3d at 1007. Based on these reasons, the Eighth Circuit concluded that "Zadvydas's six-month presumption of reasonableness is inapplicable to inadmissable aliens." Id.

We find the Eighth Circuit's reasoning persuasive and interpret Zadvydas as limiting the detention period of only those aliens whose continued confinement

21a

raises serious constitutional doubt, i.e., resident aliens who have effected entry. See id.; Xi, 298 F.3d at 841-42 (9th Cir. 2002) (Rymer, J., dissenting). But see Rosales-Garcia, 322 F.3d at 408; Xi, 298 F.3d at 837-39. In addition to the rationale given by the Eighth Circuit in Borrero, we adopt this view for several other reasons.

First, Zadvydas reads like an as-applied constitutional challenge where the Supreme Court repeatedly stated that its holding would not necessarily apply to other situations. As previously stated, Zadvydas opens with the statement that "[a]liens who have not gained initial admission to this country would present a very different question." Zadvydas, 533 U.S. at 682. Because Zadvydas was qualified in so many respects and reads like an as-applied decision, we conclude that the Supreme Court left the law, and it seems to us the statutory scheme too, intact with respect to inadmissible aliens who never have been admitted into the United States.

Second, as does the dissent in the Ninth Circuit's Xi decision, we "take the Supreme Court at its word: while indefinite detention raises serious constitutional questions in the case of aliens who have been admitted to the United States, '[a]liens who have not yet gained initial admission to this country would present a very different question.'" Xi, 298 F.3d at 840 (Rymer, J., dissenting) (quoting Zadvydas, 533 U.S. at 682). As does the Xi dissent, we reject the argument that

Zadvydas leaves us little choice but to apply § 1231(a)(6) uniformly to all aliens. See Xi, 298 F.3d at 841 (Rymer, J., dissenting). As aptly stated by Judge Rymer, "[w]e do have a choice because the Court's interpretation was discrete as to *admitted* aliens" and "[i]t was driven by the need to avoid constitutional problems that pertain to those who are admitted – but that do not pertain to those who are *not* admitted." Id. We further agree with Judge Rymer that "[t]he result is a nuanced interpretation of § 1231(a)(6) that keeps it from being applied unconstitutionally but otherwise leaves it alone. When a statute has different applications, it is not necessary to say that it is categorically infirm; it is only the constitutionally problematic aspects which are subject to the construction that avoids the problem." Id.

Third, Zadvydas emphasizes: "Nor do the cases before us require us to consider the political branches' authority to control entry into the United States. Hence we leave no 'unprotected spot in the Nation's armor.'" Zadvydas, 533 U.S. at 695-96 (citation omitted). The ability to exclude aliens from this country at its borders is a duty entrusted to the Executive Branch so that it may protect the citizens and residents of this country from all manner of nameless dangers. Creating a right to parole for unadmitted aliens after six months would create an unprotected spot in this country's defense of its borders. For example, it may be the case that the government will not be able to determine what potential dangers a

particular unadmitted alien might pose. In such a situation, the government historically has enjoyed broad latitude in detaining those aliens until their security threat can be fully ascertained. Removing this important tool from the government's arsenal undoubtedly would subject the residents of this nation to greater security risks.

Moreover, in the instant case, the government already has determined that Benitez poses a danger to the community and is likely to engage in further violent behavior, and therefore is a security threat. Benitez engaged in serious criminal conduct while paroled into this country. Even after his parole was revoked based on his criminal convictions, the INS again issued a Notice of Releaseability, but later revoked that Notice based on its determination that Benitez still refused to conform his conduct to the laws of this nation. In light of Benitez's criminal history, requiring Benitez's release after six months' detention does, in fact, create the very "unprotected spot in the Nation's armor" that the Supreme Court sought to avoid in Zadvydas. See Xi, 298 F.3d at 842 (Rymer, J., dissenting). We decline to read § 1231(a)(6) so as to deprive the Executive Branch of this authority absent an express statement from the Supreme Court to the contrary.

Fourth, ideally Benitez should be returned as soon as possible to his own country. However, this cannot happen if his own country will not allow it. Congress has given the Attorney General the discretion to detain or parole persons

who are not admitted into this country and whose own country will not take them back. In light of the fact that the Supreme Court in Zadvydas went to such great lengths to distinguish inadmissible aliens, we shall not fetter that discretion by presumptively requiring their release into this country after six months. As stated by Judge Rymer, "Congress did not prescribe it, nor does a serious constitutional doubt compel it, and we have no call to construe § 1231(a)(6) to contain this limitation for inadmissible aliens." Xi, 298 F. 3d at 843 (Rymer, J., dissenting).

Fifth and finally, reading § 1231(a)(6) as creating a right to parole into this country after six months for inadmissible aliens is undoubtedly a drastic expansion of the rights of inadmissible aliens, who have never gained entry into this country. It is without question that Congress had a contrary intention when enacting IIRIRA: it sought to tighten immigration regulations. As the very language of IIRIRA mandates, courts are not to construe IIRIRA to "create any substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. § 1231(h). It is also clear that Congress intended the use of the term "inadmissibility" to subject removable aliens to the same potential for indefinite detention – if they could not be removed after the commission of a serious crime – to which excludable aliens had been subject both statutorily and constitutionally for years. See, e.g., S. Rep. 104-249, 1996 WL 180026 at *7 ("The opportunity that U.S. immigration law

extends to aliens to enter and remain in this country is a privilege, not an entitlement.").

Inadmissible aliens such as Benitez never truly have resided in this country free from restraint. Rather, Congress has bestowed on them the luxury of parole while their immigration applications and status are finalized. To pervert this gift from Congress into a right after six months not only would distort Congress's intent and potentially create grave security concerns for the people of the United States, but also would create needless difficulties in how the INS processes aliens. Because Zadvydas's holding is qualified in so many regards, and there is no need to construe § 1231(a)(6) to avoid constitutional due process concerns for inadmissible aliens, the government has the authority under § 1231(a)(6) to detain inadmissable aliens indefinitely and Zadvydas's six-month presumption of reasonableness is inapplicable to inadmissible aliens.

III. CONCLUSION

For all the above reasons, we affirm the district court's denial of Benitez's § 2241 petition.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DANIEL BENITEZ,

Petitioner.

vs.

ROBERT A. WALLIS,
DISTRICT DIRECTOR, I.N.S,

Respondent.

_____/

CASE NO. 5:02cv19 MMP

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ORDER

This matter is before the Court on the Report and Recommendation of the Magistrate Judge, which recommends denying Mr. Benitez' petition for writ of habeas corpus. For the reasons which follow, the Report and Recommendation is adopted.

Mr. Benitez attempted to gain access to the United States from Cuba illegally but was detained by the Immigration and Naturalization Service (INS) and eventually paroled into the country. He has not improved his status in the United States beyond that of a non-admitted parolee since that date.

In 1993, Mr. Benitez was convicted in a Florida state court of various crimes relating to armed robbery and sentenced to 20 years in prison. Also, his parole into the country was revoked by an INS panel and removal proceedings were commenced against him. When he was released from state custody, he was placed directly into INS custody. He remains in INS custody pending completion of removal proceedings

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...ies 58 & 79(a) FRCP or 32(d)(1) & 55 FRCP
...ices sent to: D. Benitez, M. Finney
MD

against him.

When an alien has been found to be unlawfully present in the United States and a final order of removal has been entered, the Government ordinarily secures the alien's removal during a subsequent 90-day statutory "removal period," during which time the alien normally is held in custody.

Moreover, Title 8 U.S.C. §§ 1231(a)(6) authorizes further detention if the Government fails to remove the alien during those 90 days. It says:

> An alien ordered removed [1] who is inadmissible ... [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision.

Based on this statute, the petitioner has been detained in INS custody since the completion of his state term of incarceration, pending his removal back to his Cuban homeland. The problem is that Cuba has declined to fully implement the repatriation treaty with the United States, and there is no indication that petitioner can be returned to Cuba in the foreseeable future. The petitioner claims that he is therefore being detained indefinitely and that such detention violates rights that he has under the United States Constitution.

The petitioner relies greatly on Zadvydas v. Davis, 121 S.Ct. 2491 (2001), which held that the above statute, applied to resident aliens, contained an implicit "reasonable time" limitation. Thus, resident aliens could not be indefinitely detained, and a post-

removal-period detention of six months or less was deemed presumptively reasonable. Petitioner claims, therefore, that he must either be removed or released after six months detention.

The flaw in petitioner's argument, however, is that he is not a "resident alien," as the petitioners were in Zadvydas. Instead, he is a non-admitted parolee, and, as Zadvydas itself explained, that distinction makes a crucial difference. In Zadvydas, Justice Breyer explicitly discussed this distinction:

> The Government argues that, from a constitutional perspective, alien status itself can justify indefinite detention, and points to Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953), as support. That case involved a once lawfully admitted alien who left the United States, returned after a trip abroad, was refused admission, and was left on Ellis Island, indefinitely detained there because the Government could not find another country to accept him. The Court held that Mezei's detention did not violate the Constitution. Id., at 215-216, 73 S.Ct. 625.
>
> Although Mezei, like the present cases, involves indefinite detention, it differs from the present cases in a critical respect. As the Court emphasized, the alien's extended departure from the United States required him to seek entry into this country once again. His presence on Ellis Island did not count as entry into the United States. Hence, he was "treated," for constitutional purposes, "as if stopped at the border." Id., at 213, 215, 73 S.Ct. 625. And that made all the difference.
>
> The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. See Kaplan v. Tod, 267 U.S. 228, 230, 45 S.Ct. 257, 69 L.Ed. 585 (1925) (despite nine years' presence in the United States, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States"); Leng May Ma v. Barber, 357 U.S. 185, 188-190, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958) (alien "paroled" into the United States pending admissibility had not effected an "entry"). It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. See United States v. Verdugo-Urquidez, 494 U.S. 259, 269, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (Fifth Amendment's protections do not extend to aliens outside the territorial boundaries); Johnson v. Eisentrager, 339 U.S. 763, 784, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (same). But once an alien enters the country, the legal circumstance

changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. See Plyler v. Doe, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); Mathews v. Diaz, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596-598, and n. 5, 73 S.Ct. 472, 97 L.Ed. 576 (1953); Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); cf. Mezei, supra, at 212, 73 S.Ct. 625 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"). Indeed, this Court has held that the Due Process Clause protects an alien subject to a final order of deportation, see Wong Wing v. United States, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896), though the nature of that protection may vary depending upon status and circumstance, see Landon v. Plasencia, 459 U.S. 21, 32-34, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982); Johnson, supra, at 770, 70 S.Ct. 936.

Zadvydas 121 S.Ct. at 2500-01.

Under the cases cited by Justice Breyer, Mr. Benitez's parole into the United States did not count as an "entry" into the United States. Therefore, Mr. Benitez does not enjoy the full panoply of Constitutional rights which accrue to a person who is deemed to have entered the United States. The result, as the Magistrate Judge correctly points out, is that this court's jurisdiction is limited to determining "whether there exists a facially legitimate and bona fide reason for the government's decision...." Jean v. Nelson, 727 F.2d 957, 978 (11th Cir.1984). Here, the INS determined that Mr. Benitez was removable because he posed a danger to the community and was likely to engage in further violent behavior. These are facially legitimate and bona fide

reasons to attempt to remove him, and also to detain him until removal is possible. Accordingly, this Court has no jurisdiction to second-guess the decisions of INS on these issues, and it is hereby

ORDERED AND ADJUDGED:

1. The Report and Recommendation of the Magistrate Judge (doc. 7) is adopted and incorporated herein.

2. The petition for writ of habeas corpus is DENIED, and the clerk is directed to close the file.

DONE AND ORDERED this 11TH day of June, 2002.

Maurice M. Paul

Maurice M. Paul, Senior District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DANIEL BENITEZ,
Petitioner,

vs.

ROBERT A. WALLIS
Respondent,

5:02cv19/MMP/MD

/

REPORT AND RECOMMENDATION

This matter is before the court upon a petition for writ of habeas corpus (doc. 1) filed pursuant to 28 U.S.C. § 2241. The respondents filed an answer (doc. 5), and petitioner filed a response (doc. 6).

Petitioner is an alien citizen of Cuba who entered this country in 1980. He contends that upon his release from the Florida Department of Corrections in July of 2001 after having served his sentence for armed robbery and armed burglary, he was re-arrested by officials from the Immigration and Naturalization Service ("INS"), and has been detained ever since. Petitioner asserts that mandatory, indefinite detention is unconstitutional and that he is entitled to release based on *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). In *Zadvydas*, the Supreme Court held that after a six month period of detention, if an alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing in order to justify continued detention. 121 S.Ct. at 2505. The court also held that an alien may be confined until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future. *Id.*

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(Rules 58 & 79 (a) FRCP or 32 (c) FRCrP)
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According to the respondent, petitioner attempted entry into the United States on or about June 26, 1980. Aliens such as the petitioner who are Cuban and who attempted entry between April 15, 1980 and October 20, 1980 are known as "Mariel Cubans" because their departures from Cuba were generally part of the "Mariel Boatlift." Petitioner was paroled into the United States on or about July 3, 1980, but has never adjusted his status to that of lawful permanent resident.

Petitioner was convicted of grand theft on June 20, 1983 and received a three year term of probation (doc. 5, exh. B). Petitioner applied to adjust his immigration status to that of permanent resident, but the application was denied because his criminal conviction made him excludable under section 212(a)(9) of the Immigration and Nationality Act (doc. 5, exh. C). A second application was denied for lack of prosecution in March of 1990 (doc. 5, exh. D). On April 5, 1993 petitioner was sentenced to a twenty year term of imprisonment after being convicted of armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery and unlawful possession, sale or delivery of a firearm with altered or removed serial number (doc. 5, exh. E). By letter dated June 1, 1993, petitioner was advised that his parole was revoked and that he would be taken into custody of the INS pending exclusion proceedings (doc. 5, exh. F & G). On the same date the INS issued a notice to appear in which it charged that petitioner was subject to removal from the United States because: (1) he was an alien who had been convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more, § 212(a)(2)(B) of the INA, 8 U.S.C. § 1182(a)(2)(B); and (2) he was an intending immigrant not in possession of valid travel documents, § 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(7)(A)(i)(I) (doc. 5, exh. G). On December 12, 1994, petitioner was found to be subject to exclusion pursuant to both of the cited provisions (doc. 5, exh. H). He waived his right to appeal this decision (*Id.*).

On October 11, 2001, petitioner was notified that on November 6, 2001 his status would be reviewed pursuant to the Cuban Review Plan to determine whether it was in the public interest to release him from INS custody (doc. 5, exh. I). The instant petition challenging the petitioner's continued custody by the INS was filed on January 1, 2002 and

received by the court on January 11, 2002. On January 17, 2002, petitioner was served with a Notice of Releasability by the Cuban Review Plan in which petitioner was advised that a panel had determined that he was releasable under the criteria established in the Plan (doc. 5, exh. J). He was further advised that he would not be released from custody until a suitable sponsorship or placement had been arranged for him. Finally, he was informed that his release from custody would be conditioned upon his continuing to maintain proper behavior while the search for sponsorship was underway, and that failure to do so could result in continued confinement.

Through the instant § 2241 petition, petitioner challenges the INS's custody over him and seeks release from detention. Respondent acknowledges the jurisdiction of the court, but states that the INS's continued custody over an inadmissible alien such as the petitioner is lawful and must be upheld, notwithstanding the finding of the Cuban Review Plan that he is releasable.

Petitioner does not rebut respondent's contention that he entered the United States as a parolee[1] conditioned on a bond that was ultimately revoked, and that he has never successfully adjusted his immigration status to that of a lawful resident alien. Thus, petitioner's current position under the law is that of an alien seeking admission into the United States. Title 8 U.S.C. § 1182(d)(5)(A)[2]; *Leng May Ma v. Barber*, 357 U.S. 185, 190, 78 S.Ct. 1072, 1075, 2 L.Ed.2d 1246 (1958) ("[the parole of aliens seeking admission to the United States] was never intended to affect an alien's status"); *Jean v. Nelson*, 727 F.2d 957, 969 (11th Cir. 1984) ("an alien's legal status is not altered by detention or parole under the entry doctrine fiction."); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir.

[1]Petitioner's boilerplate responsive memorandum argues, unpersuasively and contrary to established law, that Mariel Cubans should not be classified as aliens who have been "stopped at the border."

[2]Title 8 U.S.C. § 1182(d)(5)(A) provides in pertinent part that the "Attorney General may . . . in his discretion parole into the United States temporarily . . . any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

1991). Aliens seeking admission have neither a constitutional right to be admitted into this country, *Fernandez Roque v. Smith*, 734 F.2d 576, 583 (11th Cir. 1983) (citing *Landon v. Plasenci*, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d 21, 32 (1982); *Bridges v. Wixon*, 326 U.S. 135, 151, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103, 2119 (1945)), nor any constitutional rights with regard to their applications for admission. *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984); see also *United States v. Rodriguez-Fernandez*, 234 F.3d 498, 501 n.7 (11th Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338, 1346 (11th Cir. 2000). And denial, or in this case revocation, of parole does not rise to the level of a constitutional infringement. *Fernandez-Roque*, 734 F.2d at 582; *Jean*, 727 F.2d at 972.

Title 8 U.S.C. §1231 governs detention and removal of aliens ordered removed. Section 1231(a)(1)(A) provides that once an alien is ordered removed the Attorney General shall remove the alien within a period of 90 days. During the removal period, the Attorney General is to detain the alien. Title 8 U.S.C. § 1231(a)(2) specifically provides that "[u]nder no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2)[3] or 1182(a)(3)(B)[4] of this title or deportable under section 1227(a)(2)[5] or 1227(a)(4)(B)[6] of this title." In spite of the finding of the panel under the Cuban Review Plan that petitioner is releasable, petitioner clearly could be classified as either inadmissible or deportable due to his criminal history, and would thus be subject to mandatory detention.

The Supreme Court's decision in *Zadvydas* limited the application of § 1231, holding that this statute does not authorize indefinite detention of aliens admitted to the United States. However, the individuals whose cases were before the *Zadvydas* court were aliens

[3]This section provides that aliens convicted of certain crimes, including crimes involving moral turpitude, are inadmissible.

[4]This section provides that aliens whose admission raises security issues due to an intent to spy, sabotage or engage in terrorist activities, among other things, are inadmissible.

[5]This section provides that aliens convicted of certain crimes, including crimes for which a sentence of one year or longer may be imposed and crimes involving moral turpitude, are deportable.

[6]This section provides that aliens whose presence raises security issues due to an intent to or history of engaging in espionage, sabotage, or terrorist activities, among other things, are deportable.

who were lawful permanent residents. For that reason, petitioner's reliance on *Zadvydas* as authority supporting his release is mistaken. The *Zadvydas* Court specifically differentiated between the situation of an alien who has effected entry into the United States, such as the petitioners in that case, and one, such as the instant petitioner, who has not. 121 S.Ct. at 2500. In particular, the Court distinguished and recognized the continued validity of *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). In *Mezei* it had found no constitutional infringement in the case of a lawfully admitted alien who left the United States, returned, was refused admission, and was left indefinitely detained on Ellis Island because the government could not find another country to accept him.

Zadvydas has undoubtedly affected the status of many INS detainees, including those identified by the petitioner in his reply memorandum. However, neither this case, nor any other provides relief for the Cuban petitioner, in light of his status as an excludable alien, despite the fact that there is no reasonable likelihood that he will be deported to his home country in the foreseeable future. And, because the record reflects a facially legitimate purpose for the petitioner's continued detention, that his release must be conditioned upon the arrangement of a suitable sponsorship or placement, it is lawful. See 8 C.F.R. § 212.12(f).

Based on the foregoing, it is respectfully RECOMMENDED:

The petition for writ of habeas corpus (doc. 1) be DENIED.

At Pensacola, Florida, this 8th day of April, 2002.

Miles Davis

MILES DAVIS
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy thereof. A copy of objections shall be served upon all other parties. Failure to object may limit the scope of appellate review of factual findings. See 28 U.S.C. § 636; *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988).

ORIGINAL

No. 03-7434

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

DANIEL BENITEZ, PETITIONER

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

In Zadvydas v. Davis, 533 U.S. 678 (2001), this Court avoided constitutional concerns by interpreting 8 U.S.C. 1231(a)(6) to limit to a "reasonable time" the period that permanent resident aliens may be detained following final orders directing their removal from the United States. Applying that standard, the Court held that a resident alien generally may not be detained under Section 1231(a)(6) for more than six months after being ordered removed, if the alien demonstrates that there is not a significant likelihood of removal in the reasonably foreseeable future. The questions presented in this case are:

1. Whether the six-month rule of Zadvydas applies to an alien who was apprehended at the border of the United States and ordered excluded from the United States.

2. If not, whether petitioner's release from immigration detention is otherwise required under 8 U.S.C. 1231(a)(6) and the canon of constitutional avoidance, despite a recent determination by immigration officials that petitioner should not be released.

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-7434

DANIEL BENITEZ, PETITIONER

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 337 F.3d 1289. The order of the district court (Pet. App. 27a-31a) and the report and recommendation of the magistrate judge (Pet. App. 32a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2003. The petition for a writ of certiorari was filed on October 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is one of approximately 125,000 Cuban nationals, many of them convicted of crimes in Cuba, who attempted

to enter the United States illegally during the 1980 Mariel boatlift. After Cuba refused to accept the return of Mariel Cubans who were stopped at the border and denied entry into the United States, the Attorney General, through the Immigration and Naturalization Service (INS), soon paroled all but a few hundred of those Cubans into this country pursuant to his discretionary authority under 8 U.S.C. 1182(d)(5) (1976 & Supp. IV 1980). See generally Pet. App. 2a & n.1; Fernandez-Roque v. Smith, 734 F.2d 576, 578-579 (11th Cir. 1984); Palma v. Verdeyen, 676 F.2d 100, 101-102 (4th Cir. 1982).

Section 1182(d)(5)(A) then authorized, and as amended continues to authorize, the Attorney General (now the Secretary of Homeland Security[1]) to parole aliens applying for admission to the United States into the country "temporarily under such conditions as he may prescribe" and only for "urgent humanitarian reasons or significant public benefit," but it provides that "such parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General, the purposes of the alien's parole have been served, the alien shall forthwith be

[1] On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security and assigned to its Bureau of Immigration and Customs Enforcement (ICE). See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (6 U.S.C. 251(2)). Respondent Mata is the successor to the INS District Director who was named as the lead respondent to the habeas corpus petition in the district court and as the respondent in this Court.

returned to custody, "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

In 1984, the United States and Cuba reached an accord concerning immigration between the two countries, including the return of 2746 specified individuals with serious criminal backgrounds or mental infirmities. See Immigration Joint Communique Between the United States of America and Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057, 1984 WL 161941. Approximately 1646 Mariel Cubans have been repatriated to Cuba under the 1984 accord. The most recent repatriations occurred in October 2003. The next repatriations are scheduled to occur in December 2003.

Pursuant to Section 1182(d)(5)(A), the Attorney General promulgated regulations in 1987 governing the parole and revocation of parole of Mariel Cubans (defined to include any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980) pending either an exclusion hearing or the alien's return to Cuba or another country. See 8 C.F.R. 212.12; 52 Fed. Reg. 48,802 (1987). Those regulations supplement the general regulations governing the parole and release of aliens who are seeking admission to the United States. See 8 C.F.R. 212.5, 241.4.

In 1990, Congress added a new statutory provision, 8 U.S.C. 1226(e) (1994), which limited the Attorney General's power to release excludable aliens on parole. See Immigration Act of 1990, Pub. L. No. 101-649, § 504(b), 104 Stat. 5050. Section 1226(e)(1) provided that, "[p]ending a determination of excludability, the

Attorney General shall take into custody any alien convicted of an aggravated felony." 8 U.S.C. 1226(e)(1) (1994). Section 1226(e)(2) and (3) then provided that the Attorney General "shall not release such felon from custody" unless the Attorney General determined under 8 U.S.C. 1253(g) (1994) that the alien's country of removability would not accept his return and, inter alia, the Attorney General concluded, after review of the alien's request for release and the severity of the alien's felony, that "the alien will not pose a danger to the safety of other persons or to property." 8 U.S.C. 1226(e)(2) and (3) (1994). Section 1226(e) otherwise left unaffected the Attorney General's discretion to grant, deny, or revoke parole under Section 1182(d)(5)(A).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, Congress added a new Section 1231 to Title 8 of the United States Code. Section 1231(a)(2) requires the detention, during the statutory 90-day removal period, of aliens who have been ordered removed from the United States, including aliens who have been stopped at the border and were regarded as "excludable" under prior law.[2] Section 1231(a)(6) then provides that an alien ordered

[2] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See Landon v. Plasencia, 459 U.S. 21, 25 (1982); 8 U.S.C. 1182 (1994). Aliens who had gained lawful admission to the United States or entered without permission were "deportable." See 8 U.S.C. 1251 (1994). Under IIRIRA, the new statutory category of "inadmissible" aliens includes both aliens who have not entered the country and formerly were termed "excludable," and aliens who entered the United States without permission and formerly were termed "deportable." See 8 U.S.C. 1182(a).

removed who is inadmissible under 8 U.S.C. 1182 or deportable for the commission of a specified crime, or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, "may be detained beyond the [90-day] removal period."

2. In June 2001, this Court decided Zadvydas v. Davis, 533 U.S. 678, which addressed the legality of the continued detention under 8 U.S.C. 1231(a)(6) of aliens who initially had been granted the status of lawful permanent residents and later were ordered removed, but who could not be removed within the 90-day statutory removal period. The Court construed Section 1231(a)(6) "to contain an implicit 'reasonable time' limitation." 533 U.S. at 682. In particular, to avoid "a serious constitutional problem," id. at 690, that would arise from indefinite detention of the former permanent resident aliens, the Court construed the Attorney General's authority to detain such aliens under Section 1231(a)(6) to be limited to the period of time reasonably necessary to remove them from the United States. Id. at 689. After that point, the Court reasoned, "detention no longer 'bears a reasonable relation to the purpose for which the individual was committed.'" Id. at 690 (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972) (brackets omitted)). "[F]or the sake of uniform administration," the Court further determined that detention for a period of six months is presumptively reasonable. Id. at 701. After that presumptively

reasonable period, if "the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." Ibid.

The Court emphasized in Zadvydas that "[a]liens who have not yet gained initial admission to this country would present a very different question," which was not before the Court. 533 U.S. at 682. Furthermore, in its analysis of the potential constitutional problem posed by detention of deportable permanent resident aliens, the Court rejected the United States' reliance on Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), even though that case "involve[d] indefinite detention." 533 U.S. at 693. In Mezei, the Court held that the detention of an alien who unsuccessfully sought entry into the United States but could not be removed did not violate due process. See 345 U.S. at 210-216. In Zadvydas, the Court stated that Mezei "differs from [Zadvydas] in a critical respect," because Mezei's detention on Ellis Island was a continuation of his exclusion rather than a successful entry into the United States. 533 U.S. at 693. The Court noted that aliens stopped at the border remain applicants seeking initial admission to the United States even if they are physically present in the country. Ibid. Mezei's status as an excludable alien at the border, the Court explained in Zadvydas, "made all the difference." Ibid.

3. In this case, the Eleventh Circuit -- in agreement with a majority of the circuits that have addressed the issue, but in

conflict with the Sixth and Ninth Circuits -- rejected the argument that Zadvydas's six-month rule requires the release from detention of an inadmissible Mariel Cuban with an extensive criminal history.

a. In June 1980, petitioner was apprehended at the border and prevented from entering the United States. In July 1980, the INS granted petitioner temporary immigration parole pursuant to 8 U.S.C. 1182(d)(5)(A). In June 1983, while petitioner was on immigration parole, he was convicted in Florida of grand theft, for which he received a sentence of three years of probation. Pet. App. 2a, 33a.

In April 1985, the INS denied petitioner's application to adjust his immigration status to that of a lawful permanent resident of the United States. The INS determined that petitioner's theft conviction rendered him categorically ineligible to receive that immigration benefit. Pet. App. 3a, 33a; C.A. R.E. Tab 5, Exh. C. In March 1990, the INS denied petitioner's second application for adjustment of his immigration status because petitioner had failed to prosecute the application. Pet. App. 33a.

In April 1993, petitioner was convicted in Florida state court, after entering a guilty plea, of armed burglary of a structure, armed burglary of a conveyance, two counts of armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed weapon, aggravated battery, and unlawful possession, sale, or delivery of a firearm with an altered or removed serial number. Petitioner was sentenced to a

20-year term of imprisonment for those convictions. Pet. App. 4a, 33a; C.A. R.E. Tab 5, Exh. E.

In June 1993, while petitioner was serving his state sentence, the INS commenced exclusion proceedings against petitioner based on his criminal convictions and his lack of valid documents for entering the United States. In December 1994, an immigration judge determined that petitioner is excludable and ordered him removed to Cuba. Petitioner did not appeal his exclusion order. Pet. App. 4a, 33a.

In 2001, at the completion of petitioner's state prison term, the INS returned petitioner to immigration custody. Pet. App. 5a (indicating that transfer from state prison occurred in October 2001); but see C.A. R.E. Tab 1, at 4 (habeas petition, alleging that transfer occurred on July 27, 2001). As required by the parole regulations applicable to Mariel Cubans, see 8 C.F.R. 212.12(g), the INS (now ICE) has reviewed petitioner's custody status on an annual basis. In January 2002, petitioner received notice that he would be releasable under the parole regulations when INS determined that suitable community sponsorship or placement had been found. Pet. App. 6a, 34a; see 8 C.F.R. 212.12(d) and (f). In March 2003, however, ICE revoked the earlier approval of parole because it determined that petitioner had participated in planning an escape. Pet. App. 6a; see 8 C.F.R. 212.12(e).

In July 2003, ICE again reviewed petitioner's custody status. In September 2003, petitioner was notified that he is a candidate

for release and that he will be placed in a substance-abuse treatment program when space becomes available. We are advised by ICE that petitioner's placement is expected to be in a residential program in a federal facility, and that the placement is unlikely to occur before February 2004, or to be completed before July 2004.

b. Meanwhile, in January 2002, petitioner filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the Northern District of Florida. In his petition, petitioner claimed that he had been "unlawfully detained by I.N.S. for more than Five (5) months," since his release from state prison. C.A. R.E. Tab 1, at 4 (habeas petition); see Pet. App. 28a-29a, 33a-36a.

Agreeing with the report and recommendation of a federal magistrate judge (Pet. App. 32a-37a), the district court determined in June 2002 that petitioner's detention is statutorily authorized under 8 U.S.C. 1231(a)(6), and is not limited by the six-month rule of Zadvydas because petitioner "is not a 'resident alien,' as the petitioners were in Zadvydas. Instead, he is a non-admitted parolee, and, as Zadvydas itself explained, that distinction makes a crucial difference." Pet. App. 29a. The district court concluded that because petitioner was denied admission into the United States, he does not enjoy the same constitutional rights as an alien who accomplished entry into the United States. Id. at 30a. Accordingly, the court determined, petitioner may be detained until his removal to Cuba or another nation is possible. Id. at 30a-31a.

c. The court of appeals affirmed in a published per curiam opinion. Pet. App. 1a-26a. The court of appeals explained that the language of 8 U.S.C. 1231(a)(6) "expressly authorizes the Attorney General to detain aliens beyond the 90-day removal period." Pet. App. 9a. The court further noted that petitioner -- despite his initial parole in 1980 under 8 U.S.C. 1182(d)(5)(A), and unlike the former resident aliens in Zadvydas - "is, and remains, an inadmissible alien and is similar to any other alien who has not gained entry and is stopped at this country's border." Id. at 15a-16a.[3]

The court of appeals determined (Pet. App. 17a-19a) that both Mezei and Eleventh Circuit precedent foreclose petitioner's constitutional challenge to his detention, because those cases establish that "aliens seeking admission to the United States * * * must be content to accept whatever statutory rights and privileges they are granted by Congress." Id. at 18a (quoting Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (en banc)); see Mezei, 345 U.S. at 212.

The court then rejected petitioner's argument that the six-month rule of Zadvydas "appl[ies] uniformly to all types of aliens." Pet. App. 20a. Specifically agreeing with the Eighth

[3] The court of appeals determined that the government had waived in the district court any argument that petitioner's detention is governed by the pre-IIRIRA law that authorized detention of excludable aliens at the time petitioner's final order of exclusion was entered, see, e.g., 8 U.S.C. 1226(e) (1994), rather than current Section 1231(a)(6). See Pet. App. 8a & n.13. The government does not contest that determination.

Circuit's analysis in Borrero v. Aljets, 325 F.3d 1003 (2003), the court of appeals "interpret[ed] Zadvydas as limiting the detention period of only those aliens whose continued confinement raises serious constitutional doubt, i.e., resident aliens who have effected entry." Pet. App. 21a-22a.

In support of its determination that Zadvydas's interpretation of Section 1231(a)(6) does not limit petitioner's detention, the court of appeals cited five considerations. First, the court noted that Zadvydas expressly distinguished the detention of the former permanent resident aliens in that case from the detention of aliens stopped at the border and denied admission. Pet. App. 22a (quoting Zadvydas, 533 U.S. at 682). Second, the court observed that Zadvydas's interpretation of Section 1231(a)(6) "ke[pt the statute] from being applied unconstitutionally" in the context of former resident aliens, and concluded that "it is only the constitutionally problematic aspects [of Section 1231(a)(6)] which are subject to the construction that avoids the problem." Id. at 23a (quoting Lin Guo Xi v. INS, 298 F.3d 832, 841 (9th Cir. 2002) (Rymer, J., dissenting)). Third, the court of appeals explained that whereas Zadvydas did not leave any "unprotected spot in the Nation's armor" against the initial entry of inadmissible aliens into the United States, 533 U.S. at 695-696 (quoting Kwong Hai Chew v. Colding, 344 U.S. 590, 602 (1953)), requiring the release of inadmissible aliens, after they have been stopped at the border and denied entry, would intrude upon the Executive Branch's enforcement of the immigration laws and "subject the residents of this nation

to greater security risks." Pet. App. 24a. Fourth, the court stated that extending Zadvydas's six-month rule to inadmissible aliens would be contrary to Congress's grant to the Executive Branch of discretionary power over the detention or parole of those aliens. Id. at 24a-25a. Fifth, the court noted that IIRIRA "sought to tighten immigration regulations," and it would contradict that congressional purpose -- and "pervert" the congressional authorization of discretionary parole -- to read Section 1231(a)(6) as vesting inadmissible aliens with an entitlement to the "gift" of parole. Id. at 25a-26a.

ARGUMENT

The courts of appeals disagree whether the six-month rule of Zadvydas v. Davis, 533 U.S. 678 (2001), should be extended to limit the detention of arriving aliens who are stopped at the border and denied admission to the United States, and who cannot be removed to another country. The issue has obvious importance for thousands of detained aliens, and great significance for enforcement of the immigration laws, national security, and public safety. This case presents a suitable vehicle for addressing the issue. The petition therefore should be granted.

I. THERE IS A WELL-DEVELOPED CIRCUIT CONFLICT CONCERNING THE EXTENSION OF ZADVYDAS'S SIX-MONTH RULE TO ALIENS WHO HAVE BEEN STOPPED AT THE BORDER AND DENIED ADMISSION TO THE UNITED STATES, BUT WHO CANNOT BE REMOVED

The courts of appeals are divided on the question whether Zadvydas's limitation on the duration of post-removal-order detention under Section 1231(a)(6) applies to aliens who have been

stopped at the border and denied admission. The Sixth Circuit and the Ninth Circuit apply Zadvydas's six-month rule to limit the detention of such aliens when they cannot be removed from the United States. See Martinez-Vazquez v. INS, 346 F.3d 903 (9th Cir. 2003) (excludable Mariel Cuban); Arango Marquez v. INS, 346 F.3d 892 (9th Cir. 2003) (same); Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir.) (en banc) (same), cert. denied, 123 S. Ct. 2607 (2003); Lin Guo Xi v. INS, 298 F.3d 832 (9th Cir. 2002) (inadmissible alien ordered removed under IIRIRA).

The Third, Fifth, Eighth, and Eleventh Circuits, by contrast, have determined that Zadvydas does not limit the detention of aliens who have been denied admission into the United States. See Pet. App. 1a-26a; Sierra v. Romaine, No. 02-2826, 2003 WL 22451726 (3d Cir. Oct. 29, 2003); Borrero v. Aljets, 325 F.3d 1003 (8th Cir. 2003); Rios v. INS, 324 F.3d 296 (5th Cir. 2003). Similarly, the Tenth Circuit has stated after Zadvydas that Section 1231(a)(6) preserves agency discretion whether to deny immigration parole to an excluded Mariel Cuban. Sierra v. INS, 258 F.3d 1213, 1219 (10th Cir.), cert. denied, 534 U.S. 1071 (2001). See also Hoyte-Mesa v. Ashcroft, 272 F.3d 989 (7th Cir 2001) (rejecting, after Zadvydas, due process challenge to Mariel Cuban's detention), cert. denied, 537 U.S. 846 (2002).

II. THE ISSUE WHETHER ZADVYDAS LIMITS THE POST-REMOVAL-ORDER DETENTION OF MARIEL CUBANS AND OTHER ALIENS WHO WERE STOPPED AT THE BORDER WHILE ATTEMPTING TO ENTER ILLEGALLY HAS GREAT IMPORTANCE

The Sixth and Ninth Circuits require the release into the United States of dangerous aliens, including recidivist aliens like petitioner who have committed serious crimes, despite the political Branches' determination that those aliens should not be allowed to enter the United States. Those circuits have opened a back door into the United States for aliens from nations with which the United States does not have full diplomatic relations, or that do not cooperate in repatriation of their nationals. Such aliens now know that even if they are caught while attempting to enter the United States illegally, immigration authorities may be powerless to stop them from living at large in this country -- even if they commit crimes in this country pending their removal. The new avenue of unlawful entry created by the Sixth and Ninth Circuits encourages illegal migration by inadmissible aliens, cf. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 163-164, 187-188 (1993), and creates an obvious gap in border security that could be exploited by hostile governments or organizations that seek to place persons in the United States for their own purposes.

The Bureau of Immigration and Customs Enforcement (ICE) reports that it presently is detaining approximately 2269 arriving aliens who are under final orders of exclusion or removal. More than half of those detained aliens, including 920 Mariel Cubans, have been detained for more than six months. District courts in

the Sixth and Ninth Circuits, applying their circuit precedent extending Zadvydas, thus far have required ICE to release 63 aliens who had been denied admission to the United States and did not satisfy the agency requirements for obtaining a discretionary release on parole pending their removal. The ongoing, court-ordered releases of those aliens, whom the political Branches have determined should be denied entry into the United States and release into the community even under conditions of supervision, creates precisely the "unprotected spot in the Nation's armor" that Zadvydas expressly disavowed. 533 U.S. at 695-696; see Pet. App. 23a-24a; Sierra, 2003 WL 22451726, at *12; Lin Guo Xi, 298 F.3d at 842 (Rymer, J., dissenting).

III. THE DECISION OF THE ELEVENTH CIRCUIT IN THIS CASE IS CORRECT

A. Petitioner's Detention Is Authorized By Statute

By its plain terms, 8 U.S.C. 1231(a)(6) states that the Attorney General "may" detain specified aliens beyond the 90-day statutory removal period, and does not limit the duration of that detention. The statutory language "suggests discretion," Zadvydas, 533 U.S. at 697, and "literally * * * sets no limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained," id. at 689 (internal quotation marks omitted).

As four circuits have concluded, the Sixth and Ninth Circuits are incorrect in their view that Zadvydas substitutes a universally applicable six-month rule for Congress's rule of discretionary

detention and release. Zadvydas addressed only Section 1231(a)(6)'s application to "aliens who were admitted to the United States but subsequently ordered removed." 533 U.S. at 682. This Court noted that detention of "[a]liens who have not yet gained initial admission to this country would present a very different question." Ibid. In distinguishing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Court observed that, even if aliens stopped at the border are paroled into the United States, they remain as a matter of law applicants seeking initial admission to the United States. 533 U.S. at 693 (citing cases). And the Court reaffirmed that the "critical" distinction between aliens who were stopped at the border and aliens who were admitted into the United States makes "all the difference" in a constitutional analysis of the aliens' detention. Ibid.

Furthermore, the canon of constitutional avoidance, which supported the Court's inference of an unarticulated statutory limitation on the detention of the aliens before the Court in Zadvydas, does not support a similar non-textual limitation on petitioner's detention. The constitutional-avoidance canon is grounded in "respect for Congress" and "seeks to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction." Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998). Because there is no due process problem when Section 1231(a)(6) is applied as written to aliens who were stopped at the border and

denied admission, "read[ing] an implicit limitation into the statute," Zadvydas, 533 U.S. at 689, with respect to those aliens would create, rather than minimize, the sort of friction between the Judicial and Legislative Branches that the canon of constitutional avoidance relied upon in Zadvydas is intended to avoid. See Pet. App. 22a-23a; Sierra, 2003 WL 22451726, at *10-*12; Borrero, 325 F.3d at 1006-1007; Lin Guo Xi, 298 F.3d at 841-842 (Rymer, J., dissenting).

B. Zadvydas Does Not Require Petitioner's Release From Immigration Detention

The dissenting Justices in Zadvydas expressed concern that considerations of consistency might result in extending Zadvydas's interpretation of Section 1231(a)(6) to the distinct situation of aliens stopped at the border before entry. 533 U.S. at 710 (Kennedy, J., dissenting). But even if that were true to some extent despite the contrary language in the majority opinion in Zadvydas and the critical constitutional difference discussed above, Zadvydas would not dictate that petitioner must be released. In the context of deportable resident aliens, Zadvydas: (1) construed Section 1231(a)(6) as having "an implicit 'reasonable time' limitation," id. at 682; (2) concluded that continued detention of an alien previously admitted to the United States would no longer serve its purported immigration purpose if he could not be removed to another country, id. at 690, 699; and (3) determined that the implicit "reasonable time" limitation is best administered by creating a rebuttable presumption that detention

for more than six months is unreasonable if such an alien shows that removal is not reasonably foreseeable, see id. at 696-702. The Court was clear (and it is undeniable) that Section 1231(a)(6) itself does not establish a rigid six-month limitation on post-final-order detention of any alien. See id. at 701.

The rationales for imposing limitations on continued detention and for adopting six months as an administrative presumption in Zadvydas do not apply to aliens who have been stopped at the border and denied admission. As noted above, the Court's important conclusion in Zadvydas was "that the detention there did not serve its purported immigration purpose" -- facilitating removal -- once removal from the United States was determined not to be reasonably foreseeable. Demore v. Hyung Joon Kim, 123 S. Ct. 1708, 1719 (2003); see Zadvydas, 533 U.S. at 690, 699. By contrast, the detention of aliens who have been stopped at the border and ordered excluded effectuates the government's interest in preventing the aliens' unlawful entry into and physical presence in the United States in the first place. In this case, petitioner's 1994 exclusion order constitutes a determination that he should not be, and is not, allowed to enter the United States. Petitioner's continued detention thus implements the political Branches' power to exclude him. See Fiallo v. Bell, 430 U.S. 787, 792 (1977). As the Court said in Mezei, exclusion is "a fundamental sovereign attribute exercised by the Government's political departments," and the admission of an excluded alien may "nullif[y] the very purpose of the exclusion proceeding." 345 U.S. at 210, 216. Under the

analysis of Zadvydas, therefore, the detention of aliens stopped at the border and denied entry is reasonable and permissible beyond a six-month period.[4]

C. IIRIRA Did Not Change Established Law Allowing The Discretionary Detention of Mariel Cubans Under Section 1182(d)(5)(A) And Longstanding Agency Regulations

The application of Zadvydas's six-month rule to aliens who were stopped at the border and denied admission also conflicts with the parole provisions of 8 U.S.C. 1182(d)(5). Section 1182(d)(5)(A), which authorizes the temporary parole into the United States of aliens who are applying for admission, as well as the revocation of such parole, expressly makes the grant of parole entirely discretionary and makes its revocation mandatory once the Attorney General (now the Secretary of Homeland Security) determines that its purposes have been served.[5] Nothing in Section 1231(a)(6) or Zadvydas displaces either the independent authority

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[4] Detained aliens who have been ordered removed after being stopped at the border are entitled to annual custody reviews. See 8 C.F.R. 212.12(g) (Mariel Cubans), 241.4(k) (other aliens seeking admission). The rules applicable to petitioner, for example, permit release on parole if it is determined that he is presently nonviolent, is likely to remain nonviolent, is not likely to pose a threat to the community following his release, and is not likely to violate the conditions of his parole. 8 C.F.R. 212.12(d)(2). Procedural safeguards protect against arbitrary denials of parole. 8 C.F.R. 212.12(b), (c), (d) and (g). In September 2003, despite his nine felony convictions, petitioner was notified that he is a candidate for release, which would be accomplished through placement in a residential substance-abuse program. See pp. 8-9, supra.

[5] Aliens stopped at the border who have not been admitted to the United States are deemed for purposes of the immigration laws to be applicants for admission to the United States -- even if they are physically present in the United States, and without regard to whether a removal order has been entered. See 8 U.S.C. 1225(a)(1).

to grant or deny parole in the first instance to aliens like petitioner, or the statutory duty to revoke parole if the appropriate official is of the opinion that its purposes have been served.

Prior to the enactment of IIRIRA in 1996, the long-term detention of Mariel Cubans had been upheld by numerous courts and had been the subject of congressional hearings. See Barrera-Echavarria v. Rison, 44 F.3d 1441, 1447-1448 & nn. 4,5 (9th Cir.), cert. denied, 516 U.S. 976 (1995). As the court of appeals noted in this case (Pet. App. 25a), Congress sought through IIRIRA "to tighten immigration regulations," not to loosen them. Furthermore, Congress did not amend Section 1182(d)(5)(A) to restrict the Attorney General's discretion over parole decisions or to displace the longstanding regulations issued under Section 1182(d)(5)(A) that govern the detention and release of Mariel Cubans, and there is no mention of such a fundamental policy change in the legislative history of IIRIRA. To the contrary, Congress expressly ratified, in new 8 U.S.C. 1101(a)(13)(B), the longstanding rule that parole is not an admission of the alien into the United States. See Leng May Ma v. Barber, 357 U.S. 185, 190 (1958). In the context of IIRIRA as a whole, it is not plausible that Congress intended through new Section 1231(a)(6) to repeal the statutory and regulatory provisions governing detention of Mariel Cubans and to overturn the large body of judicial precedent upholding denials of parole to Mariel Cubans. See Guzman v. Tippy, 130 F.3d 64, 65 (2d Cir. 1997) (listing leading cases).

IV. THIS CASE IS A SUITABLE VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT ON THE IMPORTANT QUESTION PRESENTED

On June 23, 2003, this Court denied the government's petition for a writ of certiorari (No. 02-1464) to review the Sixth Circuit's en banc decision in Rosales-Garcia, supra. None of the circumstances that the respondents in that case cited as grounds for denying the certiorari petition exist here.

The Rosales-Garcia respondents contended (02-1464 Br. in Opp. at 8) that this Court's review of the detention issue was not warranted in their case because it had been "intensely contested" in that case whether 8 U.S.C. 1231(a)(6), or rather pre-IIRIRA law, governed the detention of those particular aliens. No such issue exists in this case. See note 3, supra. The Court's definitive construction of Sections 1182(d)(5)(A) and 1231(a)(6) in this case clearly would govern petitioner's detention, the detention of all inadmissible aliens stopped at the border and denied admission under post-1996 law, and the detention of all previously excluded aliens to whom Section 1231(a)(6) applies.[6]

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[6] In Zadvydas, the Court proceeded on the premise (with which both parties there agreed) that Section 1231(a)(6) applied to a lawful permanent resident alien whose deportation order was entered before IIRIRA's enactment. See 533 U.S. at 684, 688. The Sixth and Ninth Circuits have determined that Section 1231(a)(6) governs the detention of Mariel Cubans and other excludable aliens even if those aliens were ordered excluded under pre-IIRIRA law. See Martinez-Vazquez, 346 F.3d 903; Arango Marquez, 346 F.3d 892; Rosales-Garcia, 322 F.3d at 401-403. The Third Circuit has held that Section 1231(a)(6) applies to all excludable and inadmissible aliens except the narrowly defined and closed class of aliens who were "in deportation proceedings pending on April 1, 1997" (i.e., IIRIRA's effective date). Sierra, 2003 WL 22451726, at *7 (emphasis added). No court of appeals has adopted the view that the pre-IIRIRA detention provisions apply generally to aliens

The respondents in Rosales-Garcia further contended (02-1464 Br. in Opp. at 12) that their case "raise[d] a substantial question of mootness" because one had been released on parole and the other was due to complete a half-way house program in September 2003, before this Court would have heard oral argument and rendered its decision. See 02-1464 Pet. at 7, 11-12, 29-30 n.8 (discussing custody determinations in Rosales-Garcia and mootness issue); 02-1464 Reply Br. Pet. Stage at 6-7 (same). This case does not present a similar mootness question. Petitioner is currently in immigration detention and, although he has been approved for release through a substance-abuse treatment program, his completion of the program is not expected to occur before July 2004 at the earliest, which is after the end of the Court's current Term. See pp. 8-9, supra.

The respondents in Rosales-Garcia also contended (02-1464 Br. in Opp. at 14) that "there [wa]s at most a shallow split among the circuits" and that this Court should await "further percolation" of the detention issue in the courts of appeals. That "percolation" has occurred since the petition in Rosales-Garcia was denied. On July 16, 2003, the Eighth Circuit rejected a petition for rehearing en banc in Borrero and thus finalized its disagreement with the Sixth and Ninth Circuits and its agreement with the Fifth Circuit. On July 17, 2003, the Eleventh Circuit joined the Fifth and Eighth Circuits and held in the instant case that Zadvydas does not apply

---

ordered removed under pre-IIRIRA law.

to the detention of a Mariel Cuban. On September 19, 2003, the Ninth Circuit extended its holding in Lin Guo Xi to the detention of an excludable Mariel Cuban who had been ordered removed before IIRIRA. See Arango Marquez, supra; see also Martinez-Vazquez, supra. And on October 29, 2002, the Third Circuit determined in Sierra that Zadvydas does not apply to the detention of a Mariel Cuban. Thus six circuits, covering States in which approximately 88% of the 2269 detained excludable and inadmissible aliens are being held, have weighed in on Zadvydas's application to such aliens. The well-developed conflict among those courts of appeals, on an issue of great practical and legal significance, warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2003

ORIGINAL

(18)

Supreme Court, U.S.
FILED
NOV 2 0 2003
OFFICE OF THE CLERK

No. 03-7434

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

DANIEL BENITEZ, *Petitioner*

v.

JOHN MATA, *Respondent.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S REPLY MEMORANDUM

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The parties agree that there is a clear split among the circuits, which has widened since the petition was filed, *see Sierra v. Romaine*, 347 F.3d 559 (3d Cir. 2003), and that this case presents both statutory and constitutional issues of tremendous public importance. Mr. Benitez does not, of course, agree with the legal arguments on the merits made in the Government's Brief, but will defer argument on these issues to merit briefing in the event this Court grants review.

Mr. Benitez does emphasize, however, that he does not believe that the Notice of Releasability, which was not received by the undersigned after he filed the Petition for a Writ of Certiorari, will render this proceeding moot. This is the second Notice of Releasability Mr. Benitez has received. The last one provided for his release into a halfway house. He was advised at that time that it would take anywhere from one month to a year for him actually to be released from incarceration. He was never released. Instead, over a year later that notice was rescinded based on an unsupported claim that he had a role in an escape attempt by other inmates.[1]

The immigration official serving him with the latest Notice of Releasability gave him the same time line – one month to a year. The notice itself states that he

[1] Mr. Benitez has never been given an opportunity to respond to or challenge this allegation and he flatly denies any involvement in an escape attempt. The only evidence of any involvement appears to be that a number of inmates who tried to escape from a state prison facility at which Mr. Benitez was incarcerated happened to have the same ethnicity as Mr. Benitez.

will not be placed in such a facility until "space becomes available." Thus, the Government's estimations that it "is expected" that he will be placed in a residential substance abuse program[2] no sooner than February 2004 and released from the program no sooner than July 2004 are likely too optimistic. His release, if at all, is likely to take substantially longer.

Moreover, even if he somehow is released before this Court decides this case, the case would not become moot. As the Sixth Circuit has explained, release on parole under the Cuban Review Plan does not moot a challenge to the Government's authority to indefinitely detain a Mariel Cuban:

> Although Rosales is not currently being detained, his immigration parole can be revoked by the INS at any time for almost any reason. Unlike parole granted following incarceration for a criminal conviction, Rosales need not do anything for the INS to revoke his parole; for instance, the INS can revoke Rosales's parole if it deems such revocation to be "in the public interest." *See* 8 C.F.R. § 212.12(h) (2002). Thus, Rosales's "release" into the United States does not constitute a termination of detention; it simply constitutes a reprieve from detention. Under these circumstances, we believe that Rosales is threatened with an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. We therefore conclude that Rosales's appeal is not moot.

Rosales-Garcia v. Holland, 322 F.3d 386, 395-96 (6th Cir. 2002) (en banc) (footnotes omitted). Full argument on this issue would only be necessary if Mr. Benitez is released before this Court could decide his case.

[2] Mr. Benitez has never been charged with any crime relating to controlled substances and has passed every single drug test he has been given.

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision of the Eleventh Circuit.

Respectfully Submitted,

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NOVEMBER, 2003

(7)

No. 03-7434

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In The

Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Certiorari Granted January 16, 2004

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INDEX

Page

Chronological List of Relevant Docket Entries 1

Petitioner's Petition for Writ of Habeas Corpus 3

Respondent's Answer 27

Report and Recommendation by Magistrate Judge 37

Order of the District Court, Filed July 11, 2002 44

Judgment of the District Court, Filed July 12, 2002 50

Respondent's Status Report to Court of Appeals 51

Petitioner's Motion to Strike Statement and Attachment in Respondent's Status Report 55

Opinion of the Court of Appeals, Filed July 17, 2003 59

Judgment of the Court of Appeals, Filed July 17, 2003 84

Order of the United States Supreme Court Granting In Forma Pauperis Status and Granting Petition for Writ of Certiorari, January 16, 2004 85

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

1/11/02	PETITION for writ of habeas corpus; Federal habeas under 28:2241. Filing Fee: $5.00 Receipt#: 106506 [Entry date 01/14/02]
1/11/02	CASE REFEREED to Magistrate Judge Miles Davis [Entry date 01/14/02]
1/16/02	ORDER BY Magistrate Judge Miles Davis, Clerk to send copies of the petition to the resp., US Atty for this District and the US Atty General. Resp shal [sic] have 60 days in which to file and answer. Pet has 30 days to file a reply. Setting answer deadline for 3/17/02 for ROBERT WALLIS, Setting response to order deadline Re: to file reply to answer for 4/16/02 for DANIEL BENITEZ Copies sent as noted on document
3/18/02	ANSWER to Petition by respondent ROBERT WALLIS (ATTORNEY: MICHAEL P FINNER) [Entry date 03/1902]
4/4/02	RESPONSE by petitioner DANIEL BENITEZ re: answer by ROBER [sic] WALLIS. [Entry date 04/04/02]
4/8/02	REPORT AND RECOMMENDATION by Magistrate Judge Miles Davis that petition for writ of habeas corpus should be DENIED Objections to R and R due by 4/29/02 Motion(s) no longer referred: Copies sent noted on document.
4/26/02	OBJECTION by petitioner DANIEL BENITEZ to report and recommendations
5/6/02	MOTION by petition DANIEL BENITEZ in support of objection nto [sic] petitioner's denial [Entry date 05/07/02]

7/11/02 ORDER by Judge Maurice M Paul adopting report and recommendations of Magistrate Judge Miles Davis and denying petition for writ of habeas corpus Copies sent as noted on document. [Entry date 07/12/03]

7/17/03 JUDGMENT for respondent ROBERT WALLIS against petition DANIEL BENITEZ pursuant to Court's order denying petition for writ of habeas corpus Copes [sic] sent as noted on document. Case closed

7/26/02 NOTICE of appeal by petitioner DANIEL BENITEZ of order Certificate of Readiness due 8/12/02 (received in Gainesville 8/2/02) [Entry date 08/05/02]

3/12/03 Appointment of and Authority to Pay Appointed Counsel Under Addendum Five (by Court of Appeals)

5/12/03 Respondent's Status Report Served (in Court of Appeals)

5/20/03 Petitioner's Motion to Strike Statement and attachment in Respondent's Status Report Served (in Court of Appeals)

5/22/03 Respondent's Response to Petitioner's Motion to Strike Statement and Attachment in Respondent's Status Report Served (in Court of Appeals)

5/29/03 Order Denying Petitioner's Motion to Strike Statement and Attachment in Respondent's status Report Served Entered (by Court of Appeals)

7/17/03 Opinion Filed (by Court of Appeals)

7/17/03 Judgment of Court of Appeals Filed

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA FLORIDA

Daniel Banitez

Petitioner 5:02CV19/MMP/MD

VS.

ROBERT WALLIS, DIRECTOR
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE

_____/

Writ of Habeas Corpus challenging the violation of Substantive Due Process Vis-à-vis Illegal Confinement

Petitioner detained on the behalf of INS

(Filed Jan. 11, 2002)

Bay County Jail Annex
5600 Nehi Road
Panama City, Florida

FORM TO BE USED BY FEDERAL PRISONERS FILING A PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
Panama, City DIVISION

Daniel Benitez 01-11721K
5600 Nehi Road
Panama City, Florida 32404
(Name, prison number, and address of place of confinement of Petitioner),

Case Number:

Petitioner, (To be assigned by Clerk)

vs.

Robert A. Willis
I.N.S. director

(Name of warden or other official having custody of Petitioner),

Respondent.

HABEAS APPLICANTS MUST COMPLETE THIS ENTIRE FORM

PLEASE COMPLETE THE FOLLOWING (check where applicable):

1. This petition concerns:

(a) ____ a conviction

(b) ____ a sentence

(c) ____ jail or prison conditions

(d) ____ prison discipline

(e) ____ parole

(f) ✓ other (explain) Illegal indefinite detention.

2. Provide the following information regarding the conviction(s) and sentence(s) for which you are presently incarcerated:

(a) Name(s) and location(s) of court: The Circuit Court of the Eleventh Judicial Circuit of Florida in and for Miami Dade County Criminal Division Miami, Florida 1351 NW 12th Street 33125

(b) Case number(s): F-91-40952

(c) Nature of the charge(s) for which you were convicted: Armed Robbery, Armed Burglary

(d) The conviction followed your plea of ✓ guilty, ___ not guilty, or ___ nolo contendere.

(e) Did you appeal the conviction or sentence? ____ Yes, ✓ No. If yes, state the date, outcome, and number assigned to the appeal:

_____

3. Are you currently represented by counsel in this case or any other court case? ___ Yes, ___ No.

4. In the spaces below, set forth every ground which supports your claim that you are incarcerated unlawfully. Briefly summarize the specific facts in support of each ground raised, and provide the information regarding exhaustion under your summary of facts. You may attach additional pages, if necessary. Conclusions which are not supported by specific facts are insufficient. Do not cite any law in your statement of facts.

CAUTION: An application for writ of habeas corpus by a prisoner authorized to apply for relief by motion under 28 U.S.C. § 2255 will not be entertained by the Court unless it appears that the remedy by § 2255 motion is inadequate. Therefore, IF any of the grounds raised below challenge the validity of your conviction or sentence as imposed by the sentencing court, YOU MUST COMPLETE ITEM 5. If they do not, you may skip item 5.

(a) GROUND ONE: N/A

SUPPORTING FACTS: I was sentenced on 4-5-1993 to 20 years state prison. I finished my sentence on 7-27-2001, and I was re-arrested by I.N.S. oficials [sic] on the same day.

I have been detained under indefinite detention since 7-27-2001. I'm a Cuban citizen but my country has not repatriation agreement with the United States.

I came to this country on June 1980. Petitioner has been unlawfully detained by I.N.S. for more than five (5) months. There exist no other remedy available for lawful release except this petition for habeas corpus.

EXHAUSTION: Have you presented ground one to the Bureau of Prisons, or in any other administrative or judicial proceeding? ____ Yes, ✓ No. If yes, provide the number(s) assigned to the proceeding, the result(s), and the date(s) of the result(s) of that proceeding, including any appeals: N/A

(b) GROUND TWO: N/A

SUPPORTING FACTS: N/A

EXHAUSTION: Have you presented ground two to the Bureau of Prisons, or in any other administrative or judicial proceeding? ___ Yes, ___ No. If yes, provide the number(s) assigned to the proceeding, the result(s), and the date(s) of the result(s) of that proceeding, including any appeals: N/A

(c) GROUND THREE: N/A

SUPPORTING FACTS: N/A

EXHAUSTION: Have you presented ground three to the Bureau of Prisons, or in any other administrative or judicial proceeding? ___ Yes, ___ No. If yes, provide the number(s) assigned to the proceeding, the result(s), and the date(s) of the result(s) of that proceeding, including any appeals:

(d) GROUND FOUR: N/A

SUPPORTING FACTS: N/A

EXHAUSTION: Have you presented ground four to the Bureau of Prisons, or in any other administrative or judicial

proceeding? ___ Yes, ___ No. If yes, provide the number(s) assigned to the proceeding, the result(s), and the date(s) of the result(s) of that proceeding, including any appeals: N/A

5. If any of the grounds raised above challenge your conviction or sentence imposed by the sentencing court:

(a) Explain in the space below why your remedy under 28 U.S.C. § 2255 is inadequate or ineffective to test the legality of your detention: N/A

(b) State whether you have ever filed a § 2255 motion, and the result: N/A

6. WHEREFORE, based on the grounds raised above, Petitioner prays that the court will grant the following relief: Stop the ilegal [sic] indefinite detention. Immediate release.

DECLARATION

I declare under penalty of perjury that I have read the above and state that the information contained therein is true and correct to the best of my knowledge.

Executed 1-1-2002, at Bay County Jail/Annex,
(date) (place)

by /s/ Daniel Benitez
Petitioner

N/A
Signature of Attorney (if applicable)

Note: If you have not paid the $5.00 filing fee, you must also submit an application to proceed in forma pauperis, which must also be signed under penalty of perjury.

SUPPORTIVE LEGAL ARGUMENT OPPOSING INDEFINITE DETENTION

On June 28, 2001, the United States Supreme Court issued it's ruling on the issue of indefinite detention in the matter of ***ZADVYDAS v. DAVIS*, Nos. 99-7791, 00-38, 2001 WL 720662 (June 28, 2001).** Before the Court for consideration was whether the Immigration and Naturalization Service (hereinafter "INS") has the authority to detain indefinitely an alien, unable to be removed or deported, beyond the 90-day statutory period provided under INA sect. 241(a)(1), and if so, for how long and under what circumstances.

Using the unambiguous demands of United States Constitution as it's foundation, the Court held that the current detention provisions **do not** permit the government to detain an alien indefinitely merely because no country is willing to accept him or her.

The Court went further to conclude that under the post-removal period detention provisions, the INS was implicitly limited as to what could be construed as "the period reasonably necessary to bring about [the alien at issue's] removal."

In October 2000, the Supreme Court granted certiorari in ***MA v. RENO*, 121 S. Ct. 297 (2000)** and ***ZADVYDAS v. UNDERDOWN*, 121 S. Ct. 297 (2000),** and consolidated the two cases for argument. The opinions of the Court in the two aforementioned cases were then used by the Court to aid in formulating it's decision in ***ZADVYDAS v. DAVIS*, Nos. 99-7791, 00-38, 2001 WL 720662 (June 28, 2001).**

The Ninth Circuit's analysis in ***MA***, began with the question as to whether Congress had given the INS the authority to detain the petitioner (an alien) indefinitely. As explained by the Court, generally, once an alien has been found removable, the Attorney General **must** remove him or her within 90 days after the removal order becomes final. There are however, many other aliens that for a colorful variety of reasons cannot be removed within those 90 days. The Court submitted for example those aliens which have been ordered removed to a country lacking a repatriation agreement with the United States, aliens under removal order to a country that simply refuses to accept him or her for other reasons, or as in some cases, removal just cannot be attained within the 90 day period.

Kim Ho Ma, an alien from Cambodia, had been convicted of Manslaughter in a gang-related shooting and sentenced to a term of imprisonment at the early age of 17. Ma was taken into custody by the INS and ordered removed upon termination of incarceration. Though under removal order, Ma remained detained with no definite end in sight. Ma challenged the constitutionality of his indefinite detention.

Ultimately, the Ninth Circuit Court heard arguments in the matter of indefinite detention on appeal from the U.S. District Court of the Western District of Washington, ***KIM HO MA v. RENO*, 56 F. Supp. 1165 (W.D. Wash. 1999.** The Court determined that Ma's continued detention violated his substantive due process rights under the Fifth Amendment to the United States Constitution and ordered him immediately released from detention. The Court made special note that, though under final removal order, the INS had been unable to remove Ma because his native land of Cambodia would not permit his return, and

the United States did not have a repatriation agreement with Cambodia. In short, removal was not in the reasonably foreseeable future barring continued detention.

In conclusion, the Ninth Circuit held that the INS lacked the authority to detain, for longer than **"a reasonable time beyond the normal ninety day statutory period authorized for removal"** an alien who had entered the United States.

In the opinion drafted under the hand of the Honorable Judge Stephen Reinhardt, the Court held that in cases where **"there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future,"** the INS **"may not detain the alien beyond that statutory period."** ***MA v. RENO*, 208 F.3d 815 (9th Cir. 2000). [emphasis added].**

Under the applicable statute, aliens under a removal order who cannot be removed by the end of the 90-day statutory period, are separated into two (2) groups. Those aliens designated by statute to be in the first group are **required** under INA s. 241(a)(3) to be released subject to specific supervisory regulations. Those falling into the second group **may** be detained beyond the removal period under the statutory provisions of INA s. 241(a)(6). Should those aliens cataloged in the second group be released, they would then be required to comply with those same supervisory regulations established in INA s.241(a)(3).

In distinguishing between the two (2) groups, the Court explained that, among other things, an alien's conviction for a criminal offense (i.e. drug offenses, certain crimes of moral turpitude, aggravated felonies, firearm offenses, etc.) would place him or her into the second group.

Though detention beyond the 90-day statutory period is permissible under INA s. 241(a)(6), there are no specific limitations established therein as to exactly how long beyond the 90-day period detention is authorized. In ***MA*, supra,** the Ninth Circuit stated that any interpretation of the statute "must read in some provision concerning the length of time beyond the removal period detention may continue, whether it be indefinitely, for a reasonable time, or some other temporal measure."

The INS' posture for argument was that the language of the statute incorporating the words "beyond the removal period" provided necessary authority to the INS to detain indefinitely an alien designated in the second group who cannot be removed in the reasonably foreseeable future. However, the Ninth Circuit rejected the INS' reading and interpretation of the relevant statute holding that the INS had the authority **only** to detain aliens for a reasonable time beyond the statutory removal period and **does not** permit indefinite detention of those aliens whose return **"there is no reasonable likelihood a foreign government will accept"** in the **"reasonably foreseeable future."** Instead, such aliens, the Court said, **must** be released subject to the supervisory authority outlined in the statute. ***MA v. RENO*, 208 F.3d 815 (9th Cir. 2000).**

As pointed out by the Court:

"... to sustain the INS' indefinite detention theory we would be required to read far more into the statute than its language implies. In the simplest terms, to say that INS may hold persons beyond a particular date does not answer the question 'for how long?' The proper reading, we conclude, is that Congress intended only that the short statutory

period during which detention is ordinarily authorized not serve as an absolute barrier to a reasonable extension of time when circumstances render an additional period necessary in order to accomplish the statutory purpose – the removal of the alien. Where no removal in the reasonably foreseeable future is possible, however, the statutory language, properly construed, does not authorize indefinite detention of such aliens."

The Court then noted the following:

" . . . when faced with the absence of an express time limitation, courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention." The Court further noted that in holding as it had kept it's reading consonant with international law.

The INS contended the answer to the constitutional challenge of indefinite detention was governed by ***BARRERA-ECHAVARRIA v. RISON*, 44 F.3d 1441 (9th Cir. 1995)(en banc),** and ***SHAUGHNESSY v. UNITED STATES ex rel. MEZEI*, 345 U.S. 206 (1953).**

The Court rejected such contention because both the aforementioned cases involved what were termed as **"excludable aliens"** rather than aliens who had already actually entered the United States. Therefore, the constitutional analysis in both cases was explicitly formulated on the **"entry fiction"** which in and of itself allows courts to treat an alien subject to exclusion proceedings as an alien **"standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States."** Under such circumstances, it

would seem reasonable that indefinite detention could be upheld as constitutional. The Court did stress however, that it has long been established that an alien who has entered United States territory, **legally or illegally,** has constitutional rights, including Fifth Amendment rights. **[emphasis added].**

Efforts by the INS to extend the law pertaining to "excludable aliens" to other aliens who have entered the United States, but whom have been later ordered removed for a number of reasons, the Ninth Circuit noted, would raise serious substantial constitutional questions. To adopt such logic would require the reconciliation of principals long established in ***WONG WING*** **"which affords constitutional protection to aliens who have been ordered deported, with the INS' suggested rule – which would (by extending the constitutional jurisprudence governing excludable aliens to such aliens) strip them of such protection."** The Court noted further that such would be **"a daunting, if not impossible, task."**

To construe INA s. 241(a)(6) by utilizing and asserting a reasonable interpretation that avoids such a constitutional inquiry is the appropriate avenue and course. ***WONG WING v. UNITED STATES*, 163 U.S. 228 (1896).**

The Petitioner concedes that the holdings of the Courts in the above-mentioned cases and their attached analysis does by no means leave the INS or government without adequate remedies with respect to aliens who may not be permanently or indefinitely detained. All aliens, regardless of the nature of circumstances, who are ordered released from detention must comply with the stringent supervision requirements of INA s. 241(a)(3). Any failure

to comply with those regulations, both through engaging in criminal activity or otherwise, could result in a revocation of their release status and once again return then to detention, most probably for an indefinite period.

In ***ZADVYDAS v. UNDERDOWN,*** the Fifth Circuit reached a different conclusion resulting in the reversal of the District Court's granting of a Writ of Habeas Corpus and order releasing the detained alien. The Fifth Circuit held that the INS has the authority to detain a resident alien based on either his or her possible danger to the community or flight risk, so long as legitimate **"good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place." [emphasis added]**

Having concluded their analysis of the two (2) aforementioned cases, the Supreme Court began its' dissection of ***ZADVYDAS v. DAVIS,*** **Nos. 99-7791, 00-38, 2001 WL 720662 (June 28, 2001).** Before the Court for issue was whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.

The Honorable Justice Breyer, in writing for the majority, began the Court's consideration by identifying the aliens to whom INA s. 241(a)(6) actually applies. The Court found the statute to apply to:

" . . . inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal."

Though the Government argued that said statute should be construed as authorizing the Attorney General, not the Courts, to determine whether or not an alien should continue to be detained, and if so, for exactly how long. To allow such a reading would shatter the long-standing, well-settled "cardinal principle" of statutory interpretation that when a statute "raises a serious doubt" regarding constitutionality, the Court will initially determine whether there is a construction that provides an avenue for the question to be avoided. ***CROMWELL v. BENSON,*** **285 U.S. 22, 62 (1932).**

Applying such creation of statutory construction, Justice Breyer stated that based on the Due Process Clause of the United States Constitution, a **"statute permitting indefinite detention of an alien would raise a serious constitutional problem"** because **"[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects."**

Further, the Court stated that government detention contravenes due process, unless the detention were ordered in a criminal issue or proceeding with attached adequate procedural protections. See, ***UNITED STATES v. SALERNO,*** **481 U.S. 739 (1987).** Recognizing that the detention in this matter is civil in nature, as opposed to criminal, the Court opined that there were no **"sufficiently strong special justification here for indefinite civil detention – at least as administered under this statute."** The government identified two (2) regulatory goals for the statute, the Court noted: (1) ensuring that aliens appear at future immigration proceedings, and (2) guarding against danger to the community. Applying

such goals, the majority found that "the first justification – preventing flight – is weak or nonexistent where removal seems a remote possibility."

In addressing the second goal, the majority held that while the need to protect the community certainly would not diminish in force over any period of time, the Court has permitted detention as a preventative measure exclusively in matters regarding **"specially dangerous individulas"** and **only** then supported by **"strong procedural measures."** In addition, in those cases where preventative detention has been allowed and said detention is potentially indefinite, the Court then required that the "dangerousness rationale" be supported by some sort of special circumstance, such as mental illness, that enhances the creation of danger.

The government then argued, as in ***MEZEI***, *inter alia,* that simple alien status, on it's own, could justify indefinite detention. However, the Court was not persuaded with such argument in any manner. The Court distinguished between two separate groups of aliens, (1) an alien who had at one time lawfully entered the United States, left for an extended period of time, then was denied admittance upon return; and (2) an alien who had actually "entered" the United States, as the petitioners have in the case at bar.

When considering whether an alien has actually "entered" the United States, it is an important determination to make in that at the time of entry certain constitutional protections then become available to those "persons" inside the United States.

In relying heavily on ***PLYLER*** the majority held that the Due Process Clause, applicable to **all** "persons" within the United States, including aliens, whether their presence in the United States be lawful, unlawful, temporary,

or even permanent, would attach the moment said alien enters the United States. See, ***PLYLER v. DOE*, 457 U.S. 202 (1982).**

The Court further acknowledged that under the holding in ***LANDON***, while the elements of "status and circumstances" may modify the actual nature of due process safeguards for an alien subject to final removal order, courts have long held that the Due Process Clause does protect. ***LANDON v. PLASENCIA*, 459 U.S. 21 (1982) citing, *WONG WING v. UNITED STATES*, 163 U.S. 228, 16 S. Ct. 977 (1896).**

In bringing it's analysis of all issues to a conclusion, the Supreme Court asserted it's belief that **"an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent."**

Despite possible constitutional problems, the Court recognized that should it have been the intention of Congress to be clear in it's statute authorizing indefinite detention, then courts must give effect to such intent. However, in consideration of such statutory intent by the Court, it was clear that Congress had not intended to authorize the Attorney General to hold indefinitely an alien who has been ordered removed.

While INA s.241(a)(6) is inclusive of the word "may", which would seem to indicate an allowance of discretion, it **does not** indicate authority for unlimited discretion. Given that each individual word of a statute must be strictly construed, one must conclude that had Congress truly intended to permit any long-term detention of

unremovable aliens, it would certainly have incorporated the specific language permitting such to appear in the statute. However, this was not done during the initial enactment of the statute, nor has it been done under any recent amendments to same.

In ***ZADVYDAS***, the Court rejected the Governments' assertion that discretionary release is simply the exception to the rule of mandatory detention. The Court stated that the detention provisions before it in consideration for scrutiny apply to all aliens from ordinary visa violator, terrorists, as well as other criminals, and the post-removal-period detention, as opposed to detention pending determination of removability or the subsequent 90-day removal period, has no obvious termination point.

Also unmoving to the majority was the Government's contention that application to cases throughout the history of the detention statute supported indefinite detention. In fact, Justice Breyer countered such assertions by concluding he finds that **"nothing in the history of these statutes clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent detention." [emphasis added].**

Based on this foundation, in strictly construing the applicable statutes, in a manner avoiding possible constitutional problems, the Court concluded that at the point where removal is not "reasonably foreseeable" the statute **no longer permits continued detention. [emphasis added].**

As to what would constitute detention beyond those limits established by statute or otherwise a period "reasonably necessary to secure removal," the Court held that a habeas court should find continued detention unreasonable,

and therefore not permitted, if removal is not "reasonably foreseeable." Quite obviously, if an alien under final removal order cannot be returned to his native land or even a third country because they refuse to accept him or her, or any other variety of colorful reasons, their removal is not "reasonably foreseeable."

In those cases where detention lay outside statutory boundaries, the majority held, the alien should then be released into the community, subject to the strict terms and conditions of supervised release. However, in those case [sic] where removal is "reasonably foreseeable" then the majority charged the reviewing court with the responsibility to "consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period."

As to what is considered a presumptively reasonable period of detention/time, Justice Breyer provided the following guidelines in writing for the majority, stating, in part:

" . . . while an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months . . . Consequently, for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the

Government 'must' respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."

In it's final conclusion, the majority held that permanent detention continuing as long as good-faith efforts were being made to effectuate the aliens removal would require an alien seeking release to bare the burden of showing the absence of any prospect for removal, no matter how unlikely or unforeseeable. To enforce such an applicable reading into a statute, the majority stated, would be to insist upon **"more than our reading of the statute can bear."**

On July 19, 2001, the Attorney General submitted *his opinion* regarding interpretation of the Supreme Court's ruling in ***ZADVYDAS*** to the INS as a guide or instruction on how to apply it's holding to those aliens seeking release. In said opinion, the Attorney General seems to read into the majority opinion language, words or a conclusion that simply does not appear.

The Attorney General opines that the Supreme Court made it clear in ***ZADVYDAS v. DAVIS*** THAT IT'S HOLDING **"doe s not apply to those aliens who are still legally at our borders or who have been paroled into the country (such as the Mariel Cubans)."** Such a reading of the majority opinion is erroneous in that it never specifically identifies "Mariel Cubans" or separates any ethnic groups of people for the purposes of singular application.

What is addressed, *inter alia*, is the difference between what would be catalogued as an "excludable alien" versus a "deportable alien", or those aliens whom have already entered the United States, and the effect of applicable detention statutes on all aliens in general. Though respectful to his position and authority, the Attorney General attempts to read into the majority opinion of our United States Supreme Court a meaning and/or conclusion that simply is nonexistent.

Petitioner concedes that the Attorney General has the authority to render decisions regarding the actual detention of an alien. Hence, petitioner does not combat or challenge the issues of that specific authority. However, he [Attorney General] is not afforded the luxury of taking the holdings or interpretations of this country's most honored and highest court and molding or manipulating them in a manner consistent to his personal beliefs or likings in order to apply them however he sees fit, to whomever he pleases, and not specifically as the Supreme Court intends. Such actions would be an abuse of authority in his official capacity and clear the way to additional constitutional problems.

If our Supreme Court had specifically addressed "Mariel Cubans" in a manner as to catalogue them with "excludable aliens," such an issue was addressed well over 100 years ago when the Supreme Court held that "excludable aliens" have some due process rights. The Court clearly stated in the later case of ***ADDINGTON,*** that "civil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection. ***ADDINGTON v. TEXAS*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed. 2D 323 (1979).**

In ***BARRERA-ECHAVARRIA***, the Supreme Court upheld as Constitutional the long-term detention of aliens who had not yet entered the U.S. The court based its decision on the 'entry fiction' recognizing those special aliens as individuals standing on the threshold of entry and therefore **not** entitled to the constitutional protection provided to those within the territorial jurisdiction of the United States. Conversely, the court gave credence to the establishment that an alien who has in fact actually entered the United States legally or illegally, has constitutional rights, including, but not limited to, those set forth in the Fifth Amendment. See, ***BARRERA-ECHAVARRIA v. RISON*, 44 F.3d 1441 (9th Cir. 1995) (en banc);** also, ***SHAUGHNESSY v. UNITED STATES ex rel. MEZEI*, 345 U.S. 206 (1953).**

A closer analysis would conclude that even Mariel Cubans would not be included in those classes of aliens identified in ***BARRERA-ECHAVARRIA***. In fact, important to note that during the occurrences of the Mariel Boatlift of 1980, normal restrictions and requirements for entry into the U.S. were lifted, or so set aside, under Executive Order by former President of the United States Jimmy Carter. The Attorney General lacks the authority to set aside an executive order issued by the President. Even if the authority existed and a law newly enacted yet effectively applying to Mariel Cubans retroactively, would certainly violate the ex post facto provisions of the United States Constitution. Hence, Mariel Cubans cannot be classified as aliens who have been "stopped at the border" or "paroled into the country" merely for the convenience of arbitrarily applying a statute, erroneously at that, to justify detention that technically has no end.

To establish such contention, an individual designated as a 'Mariel Cuban' would have to assume the distinction of a 'parolee'. Hence, he or she could then be viewed as having been released from a term of incarceration, previously imposed for a prior criminal conviction, into a term of community-based supervised release. More simply stated, a person cannot be a 'parolee' if he/she is not on 'parole'.

Black's defines "parole" as " . . . the release of a prisoner from imprisonment before the full sentence has been served . . . parole is usually granted for good behavior on the condition that the parolee regularly report to a supervising officer for a specified period."

Further, "parolee" is defined as " . . . a prisoner who is released on parole."

Black's Law Dictionary 7th Edition (1999)

"The essence of parole is release from prison, before completion of the sentence, on condition that the prisoner abide by certain rules during the balance of the sentence. Parole is not freedom."

59 Am. Jur. 2d Pardon and Parole sec. 6 (1987).

In light of such, Mariel Cubans cannot be construed as having been 'paroled into the country' merely for the convenience of allowing indefinite detention under the class of excludable aliens distinguished from by the Supreme Court in ***ZADVYDAS or BARRERA ECHAVARRIA.***

Accordingly, even Mariel Cubans are entitled to consideration for release from indefinite detention in a manner equal to any other "alien" or "non-citizen" in

accordance with provisions of the detention statutes and the holding of the Court in ***ZADVYDAS.***

In the instant case, the Petitioner was in fact establishing roots in the United States, equal in context to those of a naturalized American citizen, prior to his arrest. There was the establishment of a family, acquired employment, efforts to enhance their education, and other tangible and intangible aspects indicative to that of ties to the community. In instances where it was applicable, such as the Petitioner's, taxes were paid into federal regulatory agencies for social security or income taxes, just as any other citizen is required to do. Due to rather unfortunate circumstances, the Petitioner endured a plight with the criminal justice system that has been, and will continue to be humiliating and embarrassing. Nonetheless, the debt for such has been properly paid through incarceration. Since such conviction, the Petitioner has exhibit behavior that would indicate remorse and a desire to be successful, respected, trusted, and admired in society.

To now deny the Petitioner or any alien, other than those specifically identified as being dangerous under the guidelines discussed herein and established by majority opinion, the privilege and opportunity to slowly re-integrate back into society through supervised release, would discriminate against him or her and further be a violation of their constitutional rights to due process of law and equal protection of the law guaranteed them under the 5th and 14th Amendments to the United States Constitution.

Absent a showing by the INS that the Petitioner falls into those groups of aliens who can be removed in the reasonably foreseeable future, or otherwise showing that

they are a flight of risk or pose a serious danger to the community if released, the Petitioner should be released from his state of indefinite detention and afforded the opportunity to once again become a functioning member of the citizenship of this great country.

Therefore, the Petitioner prays this Honorable Court issue the great Writ and order their immediate discharge from the current indefinite and otherwise permanent detention.

CERTIFICATE OF SERVICE

UNDER PENALTY OF PERJURY, I HEREBY CERTIFY, that three true and correct copy and the original of the foregoing has been furnished and filed by me, to this federal district court including a motion to proceed in forma pauperis in compliance to the "Federal Mailbox Rule" (Rule 4A, Fed.R.Civ.P.), via submission to Institutional Authorities for mailing to this Court on this 1 day of Jan, ~~2001~~. 2002

/s/ Daniel Benitez
Print Name Daniel Benitez
Address 5600 Netti Road
Panama City, Florida 32404

UN-NOTARIZED OATH

UNDER PENALTY OF PERJURY, I Daniel Benitez, Pursuant to the provisions of 17 U.S.C. ss 2241, do hereby declare that I have read the foregoing, and that having intimate personal knowledge of them facts contained therein, swear that they are true and correct.

/s/ Daniel Benitez

Fri Jan 11 16:26:11 2002

UNITED STATES DISTRICT COURT

TALLAHASSEE, FL

Receipt No.	301	106506
Cashier		Susan
Tender Type		CHECK
Check Number:		3593
Transaction Type		N
DO Code	Div No	Acct
4617	3	086900
Amount		$5.00

HABEAS FILING FEE FOR DANIEL BENITEZ 5:0 2CV19/MMP/MD

EMILIO DE LA CAL 780 NE LEJEUNE RD STE 5 25 MIAMI, FL 33126

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DANIEL BENITEZ,

Petitioner,

vs.

ROBERT A. WALLIS, in his official capacity as District Director, Immigration and Naturalization Service, **5:02cv19/MMP/MD**

Respondent.

ANSWER

(Filed Mar. 18, 2002)

John Ashcroft, in his official capacity as Attorney General of the United States, and as head of the United States Department of Justice, and its subdivision, the United States Immigration and Naturalization Service ("INS"), answers the petition of DANIEL BENITEZ for habeas corpus relief and states:

Factual Background

DANIEL BENITEZ is a native and citizen of Cuba who attempted entry into the United States at Key West, Florida, on or about June 26, 1980, from the port of Mariel, Cuba. *See* Exhibit A, Form I-94, Arrival/Departure Record. He was paroled into the United States pursuant to § 212(d)(5) of the Immigration and Nationality Act ("INA") on July 3, 1980. *Id.*

On June 20, 1983, petitioner was convicted in Dade County, Florida, of grand theft, for which he received a three-year term of probation. *See* Composite Exhibit B: *State of Florida v. Benitez,* Case No. 83-2110. On April 30, 1985, an application submitted by petitioner to adjust his status to that of lawful permanent resident was denied on the basis of his criminal conviction. *See* Exhibit C, Denial of Adjustment of Status Application. A second application for adjustment of status was denied on March 9, 1990, for lack of prosecution. *See* Exhibit D, Second Denial of Adjustment.

On April 5, 1993, petitioner pled guilty to a multi-count indictment. *See* Exhibit E: *State of Florida v. Benitez*, Case No. 91-40952-A. He was convicted of the following offenses: Armed Burglary of a Structure, Armed Burglary of a Conveyance, Armed Robbery, Unlawful Possession of a Firearm While Engaged in a Criminal Offense, Carrying a Concealed Firearm, Aggravated Battery and Unlawful Possession, Sale or Delivery of a Firearm with Altered or Removed Serial Number, and was sentenced to a term of 20 years imprisonment. *Id.*

Based on his criminal convictions, petitioner's parole was revoked on June 1, 1993. *See* Exhibit F, Revocation of Parole. Thereafter, petitioner was charged as being excludable pursuant to § 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. § 1182(A)(7)(a)(i)(I), as an intending immigrant not in possession of valid travel documents; and § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B), as an alien who has been convicted of multiple criminal convictions for which the aggregate term of confinement exceeds five years. *See* Exhibit G, Form I-122. At a hearing before Charles J. Sanders, Immigration Judge, on December 12, 1994, petitioner was found excludable and deportable to Cuba. *See* Exhibit H, Immigration Judge's

Decision. The petitioner waived his appeal of this decision. *Id.*

On October 11, 2001, upon completion of his state prison sentence and transfer into INS custody, petitioner received notice that his status would be reviewed pursuant to the Cuban Review Plan to determine whether it is in the public interest to release him from INS custody. *See* Exhibit I, Notice of Need to Undergo Cuban Review Plan Process.

On January 11, 2002, petitioner filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (doc. 1). The petition does not contest the underlying immigration order of excludability, but merely challenges petitioner's continued custody by INS. *Id.* On January 17, 2002, petitioner received a Notice of Releasability by the Cuban Review Plan, in which a panel determined that the petitioner was releasable under the criteria established by the Plan at such time as the INS determines that a suitable sponsorship to a half-way house may be arranged. *See* Exhibit J, Notice of Releasability.

DISCUSSION

Habeas Jurisdiction

This court has jurisdiction to consider a challenge to the petitioner's continued detention in habeas corpus proceedings. *See Zadvydas v. Davis*, 533 U.S. ___, 121 S.Ct. 2491, 2497 (2001) (discussing that the 1996 amendments to the Immigration and Nationality Act ("INA") did not repeal habeas jurisdiction over INS detention issues). However, the INS' decision not to parole the petitioner is lawful, and is not governed by the *Zadvydas'* six-month presumptively reasonable detention standard. This is because of petitioner's status as an alien inadmissible to the United States. *Id.* at 2500.

Petitioner's Status as an Excludable Alien

As noted above, petitioner was apprehended by INS before he effected entry into the United States, and his prior release from INS custody was a parole into the United States, not an admission into this country. Likewise, petitioner has not adjusted his status to that of a lawful resident. Because the granting of parole is not an admission, the petitioner stands in the position of a person seeking admission or parole into the United States. *See* 8 U.S.C. 1182(d)(5)(A); *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) ("the parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status . . . "). Petitioner's habeas demands that he be released from INS detention on parole into this country, despite the finding of the immigration judge that the petitioner is clearly excludable. However, parole, as noted by the First Circuit, was conceived of by Congress as:

> an indulgence to be granted only occasionally, in the case of rare and exigent circumstances, and only when it would plainly serve the public interest. The historical record admits of no doubt on this score. One can argue the wisdom of such a tight-fisted choice, or whether it comports with accepted notions of the American ideal. But, in what is demonstrably something less than the best of all possible worlds, it cannot reasonably be argued but that the Congress has sown the seeds of the parole authority in such a scanty way as to plant a decidedly austere garden.

Amanullah v. Nelson, 811 F.2d 1, 6 (1st Cir. 1987) (emphasis in original).

Indeed, "[a]liens seeking admission to the United States . . . have no constitutional rights with regard to their applications . . . " *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (*en banc*), *aff'd on other grounds*, 472 U.S. 846 (1985). *See also Gonzalez v. Reno,* 212 F.3d 1338, 1340 (11th Cir. 2000); *Fernandez Roque, et al. v. Smith, et al.,* 734 F.2d 576, 583 (11th Cir. 1984). As an excludable alien with a final order of removal, the petitioner does not have constitutional rights to review of his detention, and his request for parole from detention. *Id.* Parole decisions are an integral part of the admissions process and inadmissable aliens like the petitioner cannot challenge such decisions as a matter of constitutional right. *See Fernandez-Roque v. Smith,* 734 F.2d at 582; *Jean v. Nelson,* 727 F.2d at 966, 972; *see also Alvarez-Mendez v. Stock,* 941 F.2d 956, 963 (9th Cir. 1991). As an excludable alien, his "rights are determined by the procedures established by Congress." *See Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1443 (5th Cir. 1993). Thus, petitioner does "not have a general right to the procedural due process guarantees of the Fifth Amendment." *Id.* Therefore, petitioner's arguments regarding the constitutionality of his continued detention in his habeas petition are improper.

Statutory and Legal Authority

The relevant detention provision governing the petitioner's detention is section 241(a) of the INA, 8 U.S.C. § 1231(a), which covers detention following entry of a final order of removal.[1] This provision generally affords the Attorney

[1] The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(Continued on following page)

General a ninety-day period to accomplish removal of the alien from the United States. *See* 8 U.S.C. § 1231(a)(1)(A) - (B). Congress has mandated detention of criminal aliens such as the petitioner during the ninety-day removal period: "During the removal period, the Attorney General *shall* detain the alien." 8 U.S.C.§ 1231(a)(2) (emphasis added). The statute further provides that, in certain circumstances, the Attorney General "may" continue to detain an alien after expiration of the ninety-day removal period:

> An alien ordered removed who is excludable under [Immigration and Nationality Act] section 212, removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(A)(6). Petitioner's conviction renders him excludable under § 212(A)(2) of the INA, and in fact Immigration Judge ordered him removed based on § 212(a)(2)(B) of the INA, relating to his multiple criminal convictions. *See* Composite Exhibit B.

> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B). In this case, the petitioner's removal period began when he was transferred to INS custody on December 17, 1999.

In *Zadvydas*, the Supreme Court analyzed the custody scheme of the INA as it applies to aliens who have been previously admitted into the United States. The Court held that § 1231 did not authorize indefinite detention of aliens *admitted to or present in* the United States. However, the *Zadvydas* decision was limited in its application, and clearly does not apply to petitioner, who is an alien that never effected entry into the United States. Indeed, the *Zadvydas* Court specifically distinguished its decision from the Supreme Court's earlier decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). In *Mezei*, the Supreme Court held that the indefinite detention of an alien once lawfully admitted for permanent residence who departed the United States, and then was stopped at the border attempting to return, was constitutionally permissible. *See Mezei*, 345 U.S. at 215-216. This decision was based upon what is known as the "entry fiction," which holds that aliens not admitted into the United States, including those aliens who had been previously paroled by the INS, in fact are not "present" in this country.

Noting that the *Zadvydas* decision was not overturning that of *Mezei*, the *Zadvydas* Court wrote that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas*, 121 S.Ct. at 2500 (citations omitted). Because petitioner falls into the category of aliens who have not effected entry into the United States (and is instead an alien legally at the border seeking admission), *Zadvydas* provides no authority under which he could be granted parole from detention.

Indeed the limitation of the *Zadvydas* decision is underscored by certain provisions of the interim rules, published on November 14, 2001, by the Attorney General in the Federal Register, providing for special review procedures for aliens, detained beyond the removal period, who are subject to final orders of removal. *See* Fed. Reg. Nov. 14, 2001 Vol. 66, No. 220 pp. 56967-56982 ("Interim Rules"). Consistent with *Zadvydas* the Interim Rules provide a procedure for aliens subject to a final order of removal to present a claim that they should be released from detention because there is no significant likelihood that they will be removed in the reasonable [sic] foreseeable future. *Id.* at 56978. However, the Interim Rules do not apply to aliens who technically have not entered the United States, including those aliens who have previously been granted parole into the United States. *Id.* at 56977.

Judicial Review of Executive Discretion

Judicial review of immigration detention, where authorized, is limited to minimum scrutiny of the Attorney General's decisions in this area. *Carlson v. Landon,* 342 U.S. 524, 534 (1952); *Reno v. Flores,* 507 U.S. 292, 303, 306 (1993) (upholding the Attorney General's custody scheme for juvenile aliens because these rules met "the (unexacting) standard of rationally advancing some legitimate governmental purpose"). The scope of review of the discretionary decisions of executive branch in the immigration context is extremely limited. *Jean v. Nelson*, 727 F.2d at 976.

Procedurally, a court proceeding in habeas corpus is limited to a deferential review of an agency's decision for legal error or abuse of discretion. *Carlson*, 342 U.S. at 541. Congress' plenary power over immigration extends to all

non-citizens, including permanent resident aliens. *Id.* at 524, 534. The plenary power doctrine extends to all immigration detention decisions both because the power to detain is a necessary element of the power to deport (*Carlson*, 342 U.S. at 538; *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)) and because release may jeopardize the public safety or otherwise compromise the objectives of immigration enforcement (*Carlson*, 342 U.S. at 538 (affirming detention as a means to deprive deportable aliens of "opportunities to hurt the United States")).

The petitioner's detention may be reviewed only to the extent of ascertaining whether the Attorney General has advanced a facially legitimate purpose. *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 – 1485 (11th Cir. 1985) ("[t]he facially legitimate and bona fide reason standard . . . applies to all of the Attorney General's parole decisions . . . "); *Jean v. Nelson,* 727 F.2d at 977 (scope of review limited to ascertaining whether the Attorney General has advanced a "facially legitimate and bona fide reason."); *Flores*, 507 U.S. at 306 (holding juvenile alien detention rule need only "meet the (unexacting) standard of rationally advancing some legitimate governmental purpose"); *Carlson*, 342 U.S. at 538, 542-46 (requiring only a "reasonable foundation" for prolonged detention of permanent resident alien).

Petitioner's detention by the INS is clearly based upon a facially legitimate and *bona fide* reason . . . that his release must be conditioned upon placement in a suitable half-way house or other facility. *See* 8 C.F.R. § 212.12(f). As the Eleventh Circuit noted in *Jean v. Nelson,* "[a]s to [excludable aliens], the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law." 727 F.2d at 968. The INS' decision to delay release until a suitable placement has been found is lawful

inasmuch as the petitioner is an excludable alien, and, therefore, his habeas corpus petition should be dismissed.

Conclusion

Petitioner's continued detention is lawful because he has never been admitted into the United States, and therefore he has no constitutional right to release from INS detention under *Zadvydas* or any other court decision. On these grounds, his petition should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer was served by first class mail on the *pro se* petitioner, DANIEL BENITEZ, at his address of record, Bay County Jail Annex, 5600 Nehi Road, Panama City, FL 323404 [sic], this March 18, 2002.

THOMAS F. KIRWIN
United States Attorney

/s/ Michael P. Finney
MICHAEL P. FINNEY
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Assistant U.S. Attorney
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DANIEL BENITEZ,

Petitioner,

vs. 5:02cv19/MMP/MD

ROBERT A. WALLIS

Respondent,

_____/

REPORT AND RECOMMENDATION

(Filed Apr. 8, 2002)

This matter is before the court upon a petition for writ of habeas corpus (doc. 1) filed pursuant to 28 U.S.C. § 2241. The respondents filed an answer (doc. 5), and petitioner filed a response (doc. 6).

Petitioner is an alien citizen of Cuba who entered this country in 1980. He contends that upon his release from the Florida Department of Corrections in July of 2001 after having served his sentence for armed robbery and armed burglary, he was re-arrested by officials from the Immigration and Naturalization Service ("INS"), and has been detained ever since. Petitioner asserts that mandatory, indefinite detention is unconstitutional and that he is entitled to release based on *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). In *Zadvydas*, the Supreme Court held that after a six month period of detention, if an alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing order to justify continued detention. 121 S.Ct. at 2505. The court

also held that an alien may be confined until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future. *Id.*

According to the respondent, petitioner attempted entry into the United States on or about June 26, 1980. Aliens such as the petitioner who are Cuban and who attempted entry between April 15, 1980 and October 20, 1980 are known as "Mariel Cubans" because their departures from Cuba were generally part of the "Mariel Boatlift." Petitioner was paroled into the United States on or about July 3, 1980, *but has never adjusted his status to that of lawful permanent resident.*

Petitioner was convicted of grand theft on June 20, 1983 and received a three year term of probation (doc. 5, exh. B). Petitioner applied to adjust his immigration status to that of permanent resident, but the application was denied because his criminal conviction made him excludable under section 212(a)(9) of the Immigration and Nationality Act (doc. 5, exh. C). A second application was denied for lack of prosecution in March of 1990 (doc. 5, exh. D). On April 5, 1983 petitioner was sentenced to a twenty year term of imprisonment after being convicted of armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery and unlawful possession, sale or delivery of a firearm with altered or removed serial number (doc. 5, exh. E). By letter dated June 1, 1993, petitioner was advised that his parole was revoked and that he would be taken into custody of the INS pending exclusion proceedings (doc. 5, exh. F & G). On the same date the INS issued a notice to appear in which it charged that petitioner was subject to removal from the United

States because: (1) he was an alien who had been convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more, § 212(a)(2)(B) of the INA, 8 U.S.C. § 1182(a)(2)(B); and (2) he was an intending immigrant not in possession of valid travel documents, § 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(7)(A)(i)(I) (doc. 5, exh. G). On December 12, 1994, petitioner was found to be subject to exclusion pursuant to both of the cited provisions (doc. 5, exh. H). He waived his right to appeal this decision (*Id.*).

On October 11, 2001, petitioner was notified that on November 6, 2001 his status would be reviewed pursuant to the Cuban Review Plan to determine whether it was in the public interest to release him from INS custody (doc. 5, exh. I). The instant petition challenging the petitioner's continued custody by the INS was filed on January 1, 2002 and received by the court on January 11, 2002. On January 17, 2002, petitioner was served with a Notice of Releasability by the Cuban Review Plan in which petitioner was advised that a panel had determined that he was releasable under the criteria established in the Plan (doc. 5, exh. J). He was further advised that he would not be released from custody until a suitable sponsorship or placement had been arranged for him. Finally, he was informed that his release from custody would be conditioned upon his continuing to maintain proper behavior while the search for sponsorship was underway, and that failure to do so could result in continued confinement.

Through the instant § 2241 petition, petitioner challenges the INS's custody over him and seeks release from detention. Respondent acknowledges the jurisdiction of the court, but states that the INS's continued custody over an inadmissible alien such as the petitioner is lawful and

must be upheld, notwithstanding the finding of the Cuban Review Plan that he is releasable.

Petitioner does not rebut respondent's contention that he entered the United States as a parolee[1] conditioned on a bond that was ultimately revoked, and that he has never successfully adjusted his immigration status to that of a lawful resident alien. Thus, petitioner's current position under the law is that of an alien seeking admission into the United States. Title 8 U.S.C. § 1182(d)(5)(A)[2]; *Leng May Ma v. Barber*, 357 U.S. 185, 190, 78 S.Ct. 1072, 1075, 2 L.Ed.2d 1246 (1958) ("[the parole of aliens seeking admission to the United States] was never intended to affect an alien's status"); *Jean v. Nelson*, 727 F.2d 957, 969 (11th Cir. 1984) ("an alien's legal status is not altered by detention or parole under the entry doctrine fiction."); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991). Aliens seeking admission have neither a constitutional right to be admitted into this country, *Fernandez Roque v. Smith*, 734 F.2d 576, 583 (11th Cir. 1983) (citing *Landon v. Plasenci*, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d

[1] Petitioner's boilerplate responsive memorandum agues, unpersuasively and contrary to established law, that Mariel Cubans should not be classified as aliens who have been "stopped at the border."

[2] Title 8 U.S.C. § 1182(d)(5)(A) provides in pertinent part that the "Attorney General may ... in his discretion parole into the United States temporarily ... any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

21, 32 (1982); *Bridges v. Wixon*, 326 U.S. 135, 151, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103, 2119 (1945)), nor any constitutional rights with regard to their applications for admission. *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984); see also *United States v. Rodriguez-Fernandez*, 234 F.3d 498, 501 n.7 (11th Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338, 1346 (11th Cir. 2000). And denial, or in this case revocation, of parole does not rise to the level of a constitutional infringement. *Fernandez-Roque*, 734 F.2d at 582; *Jean*, 727 F.2d at 972.

Title 8 U.S.C. §1231 governs detention and removal of aliens ordered removed. Section 1231(a)(1)(A) provides that once an alien is ordered removed the Attorney General shall remove the alien within a period of 90 days. During the removal period, the Attorney General is to detain the alien. Title 8 U.S.C. § 1231(a)(2) specifically provides that "[u]nder no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2)[3] or 1182(a)(3)(B)[4] of this title or deportable under section 1227(a)(2)[5] or 1227(a)(4)(B)[6] of this title." In spite of the

[3] This section provides that aliens convicted of certain crimes, including crimes involving moral turpitude, are inadmissible.

[4] This section provides that aliens whose admission raises security issues due to an intent to spy, sabotage or engage in terrorist activities, among other things, are inadmissible.

[5] This section provides that aliens convicted of certain crimes, including crimes for which a sentence of one year or longer may be imposed and crimes involving moral turpitude, are deportable.

[6] This section provides that aliens whose presence raises security issues due to an intent to or history of engaging in espionage, sabotage, or terrorist activities, among other things, are deportable.

finding of the panel under the Cuban Review Plan that petitioner is releasable, petitioner clearly could be classified as either inadmissible or deportable due to his criminal history, and would thus be subject to mandatory detention.

The Supreme Court's decision in *Zadvydas* limited the application of § 1231, holding that this statute does not authorize indefinite detention of aliens admitted to the United States. However, the individuals whose cases were before the *Zadvydas* court were aliens who were lawful permanent residents. For that reason, petitioner's reliance on *Zadvydas* as authority supporting his release is mistaken. The *Zadvydas* Court specifically differentiated between the situation of an alien who has effected entry into the United States, such as the petitioners in that case, and one, such as the instant petitioner, who has not. 121 S.Ct. at 2500. In particular, the Court distinguished and recognized the continued validity of *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). In *Mezei* it had found no constitutional infringement in the case of a lawfully admitted alien who left the United Stats, returned, was refused admission, and was left indefinitely detained on Ellis Island because the government could not find another country to accept him.

Zadvydas has undoubtedly affected the status of many INS detainees, including those identified by the petitioner in his reply memorandum. However, neither this case, nor any other provides relief for the Cuban petitioner, in light of his status as an excludable alien, despite the fact that there is no reasonable likelihood that he will be deported to his home country in the foreseeable future. And, because the record reflects a facially legitimate purpose for the petitioner's continued detention, that

his release must be conditioned upon the arrangement of a suitable sponsorship or placement, it is lawful. See 8 C.F.R. § 212.12(f).

Based on the foregoing, it is respectfully RECOMMENDED:

The petition for writ of habeas corpus (doc. 1) be DENIED.

At Pensacola, Florida, this 8th day of April, 2002.

/s/ Miles Davis
MILES DAVIS
UNITED STATES
MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy thereof. A copy of objections shall be served upon all other parties. Failure to object may limit the scope of appellate review of factual findings. *See* 28 U.S.C. § 636; *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

DANIEL BENITEZ,

Petitioner.

vs.

CASE NO. 5:02cv19 MMP

ROBERT A. WALLIS
DISTRICT DIRECTOR, I.N.S,

Respondent. /

ORDER

(Filed Jul. 11, 2002)

This matter is before the Court on the Report and Recommendation of the Magistrate Judge, which recommends denying Mr. Benitez' petition for writ of habeas corpus. For the reasons which follow, the Report and Recommendation is adopted.

Mr. Benitez attempted to gain access to the United States from Cuba illegally but was detained by the Immigration and Naturalization Service (INS) and eventually paroled into the country. He has not improved his status in the United States beyond that of a non-admitted parolee since that date.

In 1993, Mr. Benitez was convicted in a Florida state court of various crimes relating to armed robbery and sentenced to 20 years in prison. Also, his parole into the country was revoked by an INS panel and removal proceedings were commenced against him. When he was released from state custody, he was placed directly into

INS custody. He remains in INS custody pending completion of removal proceedings against him.

When an alien has been found to be unlawfully present in the United States and a final order of removal has been entered, the Government ordinarily secures the alien's removal during a subsequent 90-day statutory "removal period," during which time the alien normally is held in custody.

Moreover, Title 8 U.S.C.§§ 1231(a)(6) authorizes further detention if the Government fails to remove the alien during those 90 days. It says:

> An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision.

Based on this statute, the petitioner has been detained in INS custody since the completion of his state term of incarceration, pending his removal back to his Cuban homeland. The problem is that Cuba has declined to fully implement the repatriation treaty with the United States, and there is no indication that petitioner can be returned to Cuba in the foreseeable future. The petitioner claims that he is therefore being detained indefinitely and that such detention violates rights that he has under the United States Constitution.

The petitioner relies greatly on *Zadvydas v. Davis*, 121 S.Ct. 2491 (2001), which held that the above statute, applied to resident aliens, contained an implicit "reasonable time" limitation. Thus, resident aliens could not be indefinitely detained, and a post-removal-period detention of six months or less was deemed presumptively reasonable. Petitioner claims, therefore, that he must either be removed or released after six months detention.

The flaw in petitioner's argument, however, is that he is not a "resident alien," as the petitioners were in *Zadvydas*. Instead, he is a non-admitted parolee, and, as *Zadvydas* itself explained, that distinction makes a crucial difference. In *Zadvydas*, Justice Breyer explicitly discussed this distinction:

> The Government argues that, from a constitutional perspective, alien status itself can justify indefinite detention, and points to *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953), as support. That case involved a once lawfully admitted alien who left the United States, returned after a trip abroad, was refused admission, and was left on Ellis Island, indefinitely detained there because the Government could not find another country to accept him. The Court held that Mezei's detention did not violate the Constitution. *Id.*, at 215-216, 73 S.Ct. 625.
>
> Although *Mezei*, like the present cases, involves indefinite detention, it differs from the present cases in a critical respect. As the Court emphasized, the alien's extended departure from the United States required him to seek entry into this country once again. His presence on Ellis Island did not count as entry into the United States. Hence, he was "treated," for constitutional purposes, "as if stopped at the border."

Id., at 213, 215, 73 S.Ct. 625. And that made all the difference.

The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. See *Kaplan v. Tod*, 267 U.S. 228, 230, 45 S.Ct. 257, 69 L.Ed. 585 (1925) (despite nine years' presence in the United States, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States"); *Leng May Ma v. Barber*, 357 U.S. 185, 188-190, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958) (alien "paroled" into the United States pending admissibility had not effected an "entry"). It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (Fifth Amendment's protections do not extend to aliens outside the territorial boundaries); *Johnson v. Eisentrager*, 339 U.S. 763, 784, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (same). But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. See *Plyler v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-598, and n. 5, 73 S.Ct. 472, 97 L.Ed. 576 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); cf. *Mezei, supra*, at 212, 73 S.Ct. 625 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"). Indeed, this Court has held that the

> Due Process Clause protects an alien subject to a final order of deportation, see *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896), though the nature of that protection may vary depending upon status and circumstance, see *Landon v. Plasencia*, 459 U.S. 21, 32-34, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982); *Johnson, supra*, at 770, 70 S.Ct. 936.

Zadvydas 121 S.Ct. at 2500-01.

Under the cases cited by Justice Breyer, Mr. Benitez's parole into the United States did not count as an "entry" into the United States. Therefore, Mr. Benitez does not enjoy the full panoply of Constitutional rights which accrue to a person who is deemed to have entered the United States. The result, as the Magistrate Judge correctly points out, is that this court's jurisdiction is limited to determining "whether there exists a facially legitimate and bona fide reason for the government's decision. . . . " *Jean v. Nelson*, 727 F.2d 957, 978 (11th Cir. 1984). Here, the INS determined that Mr. Benitez was removable because he posed a danger to the community and was likely to engage in further violent behavior. These are facially legitimate and bona fide reasons to attempt to remove him, and also to detain him until removal is possible. Accordingly, this Court has no jurisdiction to second-guess the decisions of INS on these issues, and it is hereby

ORDERED AND ADJUDGED:

1. The Report and Recommendation of the Magistrate Judge (doc.7) is adopted and incorporated herein.

2. The petition for writ of habeas corpus is DENIED, and the clerk is directed to close the file.

DONE AND ORDERED this 11th day of June, 2002.

/s/ Maurice M. Paul
Maurice M. Paul, Senior District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DANIEL BENITEZ

VS CASE NO. 5:02cv19 MMP

ROBERT A. WALLIS

JUDGMENT

(Filed Jul. 12, 2002)

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the Petitioner take nothing and that pursuant to Court's order denying the petition for writ of habeas corpus this action be DISMISSED.

WILLIAM McCOOL,
CLERK OF COURT

July 12, 2002
DATE

/s/ Louise Trautman
Deputy Clerk: Louise Trautman

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DANIEL BENITEZ,	)	
Petitioner-Appellant,	)	
v.	)	**No. 02-14324-BB**
ROBERT A. WALLIS,	)	**(A24 650 034)**
Respondent-Appellee.	)	

RESPONDENT'S STATUS REPORT

Respondent, through undersigned counsel, respectfully advises the Court that the December 13, 2001 Notice of Releasability approving the Petitioner-Appellant for discretionary immigration parole under 8 U.S.C. § 1182(d)(5)(A) (2000) and 8 C.F.R. § 212.12 (2002) (Doc. 5 at Exh. J) has been withdrawn. *See* 8 C.F.R. § 212.12(e). The reasons for the decision (the petitioner's role in planning an escape) are set forth in the Notice of Release Withdrawal, dated and served March 10, 2003, a copy of which is attached to this Status Report. The petitioner will continue to receive consideration for immigration parole in accordance with the procedures set forth in 8 C.F.R. § 212.12.

Respectfully Submitted,

ROBERT D. McALLUM, JR.
Assistant Attorney General
Civil Division

PAPU SANDHU
Senior Litigation Counsel

/s/ EARadford
EMILY ANNE RADFORD
Assistant Director
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
(202) 616-4885

May 12, 2003

U.S. Department of Justice
Immigration and Naturalization Service

Cuban Review Plan [LOGO]
Plan de Revisión de los Casos de los Detenidos Cubanos

Name:
Nombre: BENITEZ-CANEL, DANIEL
Date of Birth:
Fecha de Nacimiento: 02/18/1958
INS File No:
Número de INS: **A-24 650 034**
Bureau of Prisons File No.:
Número del Bureau de Prisones: 06045-000
Institution:
Institución: Miami District: Orlando Sub-office

Notice of Release Withdrawal

This notice will inform you that approval to parole you from immigration custody has been withdrawn as of this date for reasons stated below. You will be scheduled for another interview before a Cuban Review Panel. You will be notified in writing of the date of the interview.

Parole approval has been revoked pursuant to 8 U.S.C. ☐1182(d)(5) and 8 C.F.R. ☐212.12(b) and/or because:

Notificacion de Cancelación de la Libertad Condicional

La presenta notificación tiane por objeto informarle que, con fecha de boy, se ha retirado la aprobación para que usted quede en libertad condicional, fuera de la custodia de Inmagración, por los motivos que so citan a continuación. Se fijará una mueva entravista, cuya fecha se la comunicará por oscrito, para que usted aparazca ante un Panel de Revisión de los Casos de los Detenidos Cubanos.

La aprobación de su libertad condicional ha sido revocada de acuardo a las disposiciones de inciso ☐212.12(b) y/o (e) del 8 C.F.R. [Código de Reglamentos Federales] dabido a lo siguiante:

You were last interviewed by a Cuban Review Panel on or about 11/05/2001 at Bay County Jail in Bay County, Florida. Subsequent to said interview, you were designated for release as per a Notice of Releasability dated on or about 12/13/2001. On or about 03/07/2003, you were cited for planning an escape from the aforementioned Bay County Jail. Accordingly, in light of the aforementioned incident, the release decision previously afforded to you has been rescinded effective this date.

Associate Commissioner for Enforcement:
Sub-Comisionado Incargado del Cumplimiento de los Loyos de Inmigración: /s/ [Illegible]
Detainee:
Detenido: Refuse to Sign
Served by:
Entregado por: /s/ [Illegible]

Date:
Fecha: 03/10/2003
Date:
Fecha: 03-10-03 (1400 hrs)
Date:
Fecha: 03-10-03

[Certificate Of Service Omitted In Printing]

Case No. 02-14324-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DANIEL BENITEZ,

Appellant,

v.

ROBERT A. WALLIS, in his capacity as District Director, U.S. IMMIGRATION & NATURALIZATION SERVICE,

Appellee.

PETITIONER'S MOTION TO STRIKE STATEMENT AND ATTACHMENT IN RESPONDENT'S STATUS REPORT

Petitioner Daniel Benitez, through the undersigned counsel duly appointed by the Court pursuant to Addendum Five, moves this Court to strike the a [sic] statement and the attachment to the Respondent's Status Report.

Petitioner does not object to the status report itself as it advises the court that the likelihood that this appeal could be rendered moot by his release on discretionary immigration parole under 8 U.S.C. § 1182(d)(5)(A) (2000) and 8 C.F.R. § 212.12 (2002) has been substantially reduced because the Notice of Releasability issued on December 13, 2001, has been withdrawn.

Respondent goes on to state that the reason for this decision is "the petitioner's role in planning an escape" and it attaches a copy of the Notice of Release Withdrawal, which reiterates this accusation. The only relevance this

withdrawal has on this case is that it removes any concern that this case will be rendered moot before the court can decide the case. The reason for the withdrawal has no legitimate bearing on this appeal. Moreover, as an event occurring after the district court's decision, the withdrawal is of course not in the record and cannot, as a matter of law, have any bearing on the correctness of the district court's order under review.

On the other hand, accusing the Petitioner of having a "role in planning an escape" is a prejudicial accusation that tends to cast the Petitioner in a negative light unrelated to the merits of this case. In fact, the Petitioner vehemently denies any role in any escape attempts. He has yet to be given an opportunity to respond to this allegation. The planned escape referred to by the Government appears to be an attempt by other inmates, Bay County Jail to escape. The Petitioner had no involvement with this attempt and, on information and belief, the only connection the Petitioner had to these other inmates was that they were all of Hispanic national origin.

The Petitioner intends to defend himself from any and all repercussions of the allegations against him, but this is not the forum for that issue to be resolved. The Government's reference to this allegation should therefore be stricken.

Certificate of Consulting Opposing Counsel

The undersigned counsel has consulted with Emily Anne Radford, Esq., attorney for Respondent and is authorized to state that the Respondent opposes the relief requested in this motion.

WHEREFORE, this Court should strike the parenthetical phrase in the second sentence of text in Respondent's Status Report and the attachment thereto.

Respectfully submitted,

MILLS & CARLIN, P.A.

/s/ John S. Mills

John S. Mills, Esq.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
(904) 350-0086 facsimile

Attorneys for Appellate
Daniel Benitez

[Certificate Of Service Omitted In Printing]

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Local Rule 26.1-1, the undersigned certifies that the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, and includes subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

1. Daniel Benitez, Appellant, Lecanto, Florida
2. David V. Bernal, Attorney for Appellee, Assistant Director, Office of Immigration Litigation, Civil Division, U.S. Department of Justice

3. John M. Bulger, Acting INS District Director, Miami District

4. Hon. Miller Davis, Magistrate Judge, U.S. District Court for the Northern District of Florida

5. Michael P. Finner, Assistant U.S. Attorney, Northern District of Florida, Panama City, Florida

6. Andrew C. MacLachlan, Attorney for Appellee, Office of Immigration Litigation, Civil Division, U.S. Department of Justice

7. Robert D. McCallum, Jr., Attorney for Appellee, Assistant Attorney General, Civil Division, U.S. Department of Justice

8. Gregory Robert Miller, United States Attorney, Northern District of Florida

9. Hon. Maurice M. Paul, Senior District Judge, U.S. District Court for Northern District of Florida

10. Daniel Vara, INS District Counsel, Miami District

By: /s/ John S. Mills
John S. Mills
Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14324

D. C. Docket No. 02-00019-CV-5-19-MMP

DANIEL BENITEZ,

Petitioner-Appellant,

versus

ROBERT WALLIS, Director INS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(July 17, 2003)

Before DUBINA, BLACK and HULL, Circuit Judges.

PER CURIAM:

Daniel Benitez, a native and citizen of Cuba, is an inadmissible alien who brought this § 2241 petition challenging his indefinite detention. The district court concluded that the INS's determinations that Benitez posed a danger to the community and was likely to engage in further violent behavior were facially legitimate and bona fide reasons to detain Benitez until removal to Cuba is possible. Consequently, the district court denied Benitez's § 2241 petition. After review and oral argument, we affirm.

I. BACKGROUND

In 1980, Daniel Benitez attempted entry into the United States from the port of Mariel, Cuba and, in effect, was stopped at the border.[1] Benitez then was paroled into the United States pursuant to § 212(d)(5) of the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1182(d)(5). Under § 1182(d)(5), the Attorney General may "in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. § 1182(d)(5).

In 1983, Benitez was convicted in Dade County, Florida, of second degree grand theft, *see* Fla. Stat. § 812.014, and was sentenced to three years' probation. Sometime thereafter, Benitez submitted an application to adjust his status to that of a lawful permanent resident. Under applicable immigration laws, Cuban refugees may

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[1] Over the past twenty-five years,

> Castro has unleashed massive waves of refugees on the United States to release the pressure of internal dissent. In the Mariel boat-lift of 1980, Castro let some 125,000 Cubans flee to the United States. Many of these refugees were dissidents, criminals or mental patients. In the summer of 1994, facing increasing hostility to his regime and open defiance of the Communist Party, Castro allowed over 50,000 refugees to flee to the United States on make-shift rafts. After the exodus of 1994, Castro threatened to unleash another wave of refugees in the spring of 1995 in an effort to discourage passage of the Helms-Burton Act. . . .

C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the GATT and the Political Doctrine*, 61 U. Pitt. L. Rev 287, 312-13 (Fall 1999).

apply for permanent resident status once they: (1) have been paroled into the United States; (2) have been physically present in the United States for one year; and (3) are eligible to receive an immigrant visa and are admissible to the United States for permanent residence. *See* 8 U.S.C. § 1255.[2]

Under the provisions of § 212(a) of the INA, certain classes of aliens are ineligible to receive an immigrant visa and are not admissible to the United States for permanent residence, and thus fail to meet the third condition outlined above. *See* 8 U.S.C. § 1182(a). One such class includes "[a]liens who have been convicted of a crime involving moral turpitude." 8 U.S.C. § 1182(a)(9) (1983). In 1985, Benitez's application for permanent resident status was denied because his criminal conviction for grand theft was a crime involving moral turpitude.[3]

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[2] Section one of the Cuban Refugee Adjustment Act of 1966, Pub.L. No. 89-732, 80 Stat. 1161, *as amended* 8 U.S.C. § 1255, historical and statutory notes, provides:

> That, notwithstanding the provisions of Section 245(c) of the Immigration and Nationality Act, . . . the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959, and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

[3] A second application for adjustment of status filed by Benitez was denied in 1990 for lack of prosecution.

In 1993, Benitez pled guilty to a multi-count criminal indictment in Florida state court. Specifically, Benitez pled guilty to armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery, and unlawful possession, sale or delivery of a firearm with an altered or removed serial number. The state court sentenced Benitez to 20 years' imprisonment.

Based on his 1993 criminal convictions in Florida, the INS determined that Benitez's continued immigration parole was against the public interest. Pursuant to 8 C.F.R. § 212.5(d)(2), the INS revoked Benitez's immigration parole.[4]

Benitez then was ordered to appear before an immigration judge "to determine whether he should be excluded and deported." The notice informed Benitez that he had a right to counsel and to have a friend or relative present at the hearing. In 1994, Benitez was found excludable and deportable to Cuba because of his criminal convictions in Florida.[5]

[4] According to § 212.5(d)(2), "when in the opinion of the district director in charge of the area in which the alien is located neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status which he or she had at the time of parole." 8 C.F.R. § 212.5(d)(2) (1993).

[5] In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *See* Pub.L. No. 104-208, 110 Stat. 3009, 3009-546 (1996). IIRIRA made comprehensive changes to the Immigration and Nationality Act (INA), including changes in immigration terminology. *See generally Assa'ad v. United States Atty. Gen.*, 332 F.3d 1321, 1326-27 (11th Cir. 2003). Previously, individuals who were ineligible for admission to the United States were referred to as "excludable," while those who had gained admission were referred to as "deportable." *See* 8 U.S.C. §§ 1182, 1251 (1994). Excludable aliens are now referred to as "inadmissible" aliens. *See* 8 U.S.C. § 1182. Additionally, the amended INA now uses the term "removal proceedings" to refer to the proceedings applicable to both inadmissible and deportable aliens. *See* 8 U.S.C. § 1229a. For the purposes of this opinion, we use the terms excludable, inadmissable, and unadmitted interchangeably. We do so not to suggest that these terms under immigration laws will always have the exact same legal meaning, but rather because these terms as applied to Benitez are without any substantive difference. Benitez is excludable under the prior version of the INA, inadmissable under IIRIRA, and his immigration parole never constituted a formal admission or entry into the United States.

(Continued on following page)

On October 11, 2001, Benitez was released into INS custody. Benitez's status then was reviewed pursuant to the Cuban Review Plan to determine whether it was in the public interest to release him from INS custody.[6] On

[6] Before the Cuban Review Panel makes a recommendation that a detainee be granted parole, a majority of the Panel must conclude that: "(i) The detainee is presently a nonviolent person; (ii) The detainee is likely to remain nonviolent; (iii) The detainee is not likely to pose a threat to the community following his release; and (iv) The detainee is not likely to violate the conditions of his parole." 8 C.F.R. § 212.12(d)(2).

The panel also must consider the following factors when determining whether to recommend further detention or release on parole of a detainee: "(i) The nature and number of disciplinary infractions or incident reports received while in custody; (ii) The detainee's past history of criminal behavior; (iii) Any psychiatric and psychological reports pertaining to the detainee's mental health; (iv) Institutional progress relating to participation in work, educational and vocational programs; (v) His ties to the United States, such as the number of close relatives residing lawfully here; (vi) The likelihood that he may abscond, such as from any sponsorship program; and (vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole." 8 C.F.R. § 212.12(d)(3).

November 6, 2001, Benitez appeared before the Cuban Review Panel.[7]

On January 11, 2002, Benitez filed this § 2241 petition challenging his indefinite detention by the INS. On January 17, 2002, Benitez received a Notice of Releaseability, in which a Cuban Review Panel concluded that Benitez was releaseable under the criteria established by the Cuban Review Plan at such time as the INS determined that a suitable sponsorship to a half-way house could be arranged.[8] *See* 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.12 (2002) (Parole determinations and revocations respecting Mariel Cubans). On March 10, 2003, Benitez's Notice of Releaseability was revoked because the INS concluded, without a hearing, that Benitez was involved in a planned jail escape. *See* 8 C.F.R. § 212.12(e).[9] Therefore, Benitez's current detention results not only from his inadmissible

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[7] According to § 212.12(d)(1),

> The Director shall designate a panel or panels to make parole recommendations to the Associate Commissioner for Enforcement. A Cuban Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by a two-member Panel shall be unanimous. If the vote of a two-member Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Panel member is added. A recommendation by a three-member Panel shall be by majority vote. The third member of any Panel shall be the Director of the Cuban Review Plan or his designee.

8 C.F.R. § 212.12(d)(1).

[8] Although the Notice was served/delivered on January 17, 2002, it is dated December 13, 2001.

[9] Benitez disputes his involvement in the planned jail escape. This issue, however, is not before this Court.

alien status, but also from his violations of the conditions of his earlier immigration parole and the INS's determination that he has not refrained from criminal conduct while in custody.[10]

Benitez, proceeding *pro se* before the district court, asserted that his indefinite detention was unconstitutional in light of the Supreme Court's decision in *Zadvydas v. Davis,* 533 U.S. 678 (2001). According to the district court, the fact that Benitez was a "non-admitted parolee" made *Zadvydas* inapplicable because *Zadvydas* limited its holding to resident aliens. The district court concluded that the INS reasonably determined that Benitez was a danger to the community and was likely to engage in future criminal conduct. The district court further concluded that these determinations warranted Benitez's detention until he could be removed to Cuba. Finding no constitutional or statutory prohibition against Benitez's indefinite detention, the district court denied Benitez's § 2241 petition. Benitez timely appealed, and this Court, in its discretion, appointed counsel to represent Benitez on appeal.

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[10] Mariel Cubans who are being detained have their cases reviewed every year to determine whether they should be paroled. *See* 8 C.F.R. § 212.12(g)(2). There is no claim on appeal before this Court that Benitez has not received annual consideration for immigration parole in accordance with the Cuban Review Plan. Inadmissable aliens other than Mariel Cubans are considered for parole under similar procedures. *See* 8 C.F.R. § 241.4.

II. DISCUSSION

Benitez does not challenge the fact that he (1) attempted to enter illegally the United States, (2) never formally has been admitted into this country, and (3) is properly subject to removal. Instead, Benitez filed his § 2241 petition arguing only that his indefinite detention is impermissible given the Supreme Court's decision in *Zadvydas*.[11] On appeal, Benitez asserts that his indefinite detention violates both the United States Constitution and federal law.[12]

The INS continues to detain Benitez pursuant to 8 U.S.C. § 1231(a)(6). Thus, we first discuss § 1231(a)(6) and how the Supreme Court interpreted § 1231(a)(6) in *Zadvydas*. We then analyze the legal issues presented in Benitez's appeal.

A. 8 U.S.C. § 1231(a)(6)

After an alien, such as Benitez, is ordered removed from the United States, the Attorney General must attempt to secure the alien's removal within 90 days. *See* 8

[11] The Supreme Court has determined that habeas jurisdiction under § 2241 for cases involving aliens was not repealed by ADEPA [sic] or IIRIRA. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001); *see also Zadvydas*, 533 U.S. at 688 (concluding that "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention").

[12] The government does not contend that repatriation by Cuba of Benitez is reasonably foreseeable. Thus, we accept Benitez's claim that he, at present, is subject to indefinite detention.

U.S.C. § 1231(a)(1) (the "removal period").[13] "Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible. . . . " 8 U.S.C. § 1231(a)(2). Congress, however, recognized that securing an alien's actual removal within 90 days is not always possible. Consequently, § 1231(a)(6) expressly authorizes the Attorney General to detain aliens beyond the 90-day removal period, as follows:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable [for

[13] In its response brief on appeal, the government asserts that pre-IIRIRA rules govern Benitez's indefinite detention. However, in the district court proceedings, the government relied on IIRIRA, did not assert that pre-IIRIRA rules applied, and did not dispute (in any way) the district court's application of IIRIRA. Therefore, the issue of whether IIRIRA applies to Benitez's claims has been waived by the government in this particular case. *See Onishea v. Hopper*, 171 F.3d 1289, 1305 (11th Cir. 1999) (*en banc*); *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991). Consequently, we apply IIRIRA to this case, but note that IIRIRA's application in Benitez's case is not free from doubt because the deportation proceedings against Benitez commenced in 1993 and Benitez's final deportation order was entered in 1994, both events well prior to IIRIRA. *See Rosales-Garcia v. Holland*, 322 F.3d 386, 401-03 (6th Cir. 2003) (*en banc*) (discussing which statute to apply), *cert. denied*, 71 U.S.L.W. 3652, 3787, 3789 (U.S. June 23, 2003) (No. 02-1464); *cf. Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 n.2 (11th Cir. 2002) (applying IIRIRA to an indefinite detention claim where deportation proceedings commenced in 1995, prior to IIRIRA, but the final order of deportation was entered on October 3, 1997, after IIRIRA); *see also Alanis-Bustamante v. Reno*, 201 F.3d 1303, 1306-07 (11th Cir. 2000) (discussing how Congress divided deportation proceedings into three categories). Thus, we expressly do not address whether Benitez's indefinite detention claims in his § 2241 petition should be tied to his 1994 deportation order and governed by pre-IIRIRA law or whether IIRIRA applies because Benitez is not challenging his 1994 deportation order but only the length of his detention pursuant to that order.

> violations of nonimmigrant status or entry conditions, violations of criminal laws, or threatening national security] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6).

B. *Zadvydas*

In *Zadvydas,* the Supreme Court expressly addressed whether the government's authority under § 1231(a)(6) to detain two legal permanent residents beyond the 90-day removal period allowed the government to detain them indefinitely. The two legal permanent residents were ordered removed based on criminal convictions. The government, however, could not effectuate their removal because no country would accept them.

Specifically, Kestutis Zadvydas was a legal permanent resident alien of Lithuanian decent, who was born in a displaced persons camp in Germany in 1948. *Zadvydas,* 533 U.S. at 684. Zadvydas had a long criminal history and also a long history of flight, both in his criminal proceedings and his deportation proceedings. *Id.* In 1992, Zadvydas was convicted of possession with intent to distribute cocaine and was sentenced to 16 years' imprisonment in state prison. *Id.* After only two years' imprisonment, he was released into INS custody and ordered deported to Germany. *Id.*

Germany, however, refused to accept Zadvydas because he was not a German citizen. *Id.* Next, the INS

attempted to deport Zadvydas to Lithuania. *Id.* Lithuania refused to accept Zadvydas because he was not a citizen or a permanent resident of Lithuania. *Id.* The INS also tried unsuccessfully to deport Zadvydas to the Dominican Republic (Zadvydas's wife's country). *Id.*[14]

In *Zadvydas,* the Supreme Court also considered the case of Kim Ho Ma. *Id.* at 685. Ma was born in Cambodia, but fled to the United States at an early age. *Id.* In 1995, Ma was convicted of manslaughter and was sentenced to 38 months' imprisonment. *Id.* After two years' imprisonment, he was released into INS custody and ordered removed. *Id.* The United States, however, has no repatriation treaty with Cambodia. *Id.* at 686. Having no place to send Ma, the INS kept him in custody because "it was unable to conclude that Mr. Ma would remain nonviolent and not violate the conditions of release." *Id.* at 685-86 (internal quotation marks omitted).[15]

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[14] The district court ordered Zadvydas released under supervision because it believed that "the Government would never succeed in its efforts to remove Zadvydas from the United States, leading to his permanent confinement, contrary to the Constitution." *Zadvydas,* 533 U.S. at 685. The Fifth Circuit reversed, concluding "that Zadvydas' detention did not violate the Constitution because eventual deportation was not 'impossible,' good-faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review." *Id.*; *see also Zadvydas v. Underdown,* 185 F.3d 279 (5th Cir. 1999).

[15] In the district court, more than one hundred habeas corpus petitioners, like Ma, challenged their ongoing detention by the INS. The district court designated five lead cases that presented issues common to all petitioners and directed the parties to brief and argue those issues before five district court judges. The five district court judges issued a joint order establishing a legal framework to apply in each individual case. The five-judge panel determined that the Constitution

(Continued on following page)

In evaluating indefinite detention in *Zadvydas,* the Supreme Court considered whether indefinite detention of resident aliens, if authorized by § 1231(a)(6) as the government contended, would present constitutional problems. The Supreme Court acknowledged that the two resident alien petitioners in *Zadvydas* enjoyed certain constitutional privileges associated with individuals who have gained entry into the United States. *Id.* at 693.

In *Zadvydas,* the Supreme Court also explained that *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953), permits the indefinite detention of unadmitted aliens whom the government is unable to return anywhere else, but noted that *Mezei* "differs from the present cases [in *Zadvydas*] in a critical respect." *Zadvydas,* 533 U.S. at 693. The critical difference is that the alien in *Mezei* was "treated, for constitutional purposes, as if stopped at the border." *Zadvydas,* 533 U.S. at 693 (internal citations omitted). According to the Supreme Court in *Zadvydas,* "that made all the difference" in its earlier decision that Mezei's indefinite detention did not violate the Constitution. *Id.*

In *Zadvydas,* the Supreme Court further stressed that "[t]he distinction between an alien who has effected an entry into the United States and one who has never

forbids post-removal detention unless there is a realistic chance that the alien will be deported. The panel further concluded that because there was no repatriation agreement with Cambodia, there was no realistic chance that Ma and the others would be deported. A single judge then applied this ruling to Ma and held that he should be released. The Ninth Circuit affirmed Ma's release for essentially the same reasons as outlined by the panel of five judges. *See Kim Ho Ma v. Reno,* 208 F.3d 815 (9th Cir. 2000).

entered runs throughout immigration law." 533 U.S. at 693. The Supreme Court also emphasized that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* (citations omitted). "But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* (citations omitted).

After an extended discussion of the serious constitutional problems of permitting the indefinite detention of legal permanent residents as opposed to unadmitted aliens, the Supreme Court in *Zadvydas* saved § 1231(a)(6) from unconstitutionality in the context of a resident alien by limiting the post-removal-period detention to a length of time reasonably necessary to bring about the actual removal of the resident alien. *Id.* at 694-99. The Supreme Court then recognized six months as a presumptively reasonable time of post-removal-period detention for resident aliens. *Id.* at 699-702.

C. Circuit Split Post-*Zadvydas*

A circuit split has developed as to whether *Zadvydas* limits only the government's authority to detain resident aliens or whether *Zadvydas* applies to all categories of aliens. *Compare Borrero v. Aljets,* 325 F.3d 1003, 1007 (8th Cir. 2003) (concluding "that *Zadvydas*'s six-month presumption of reasonableness is inapplicable to inadmissible aliens"); *Rios v. I.N.S.,* 324 F.3d 296, 297 (5th Cir. 2003) (concluding that *Zadvydas* "distinguished the status of

deportable aliens from that of excludable aliens"); *Hoyte-Mesa v. Ashcroft,* 272 F.3d 989, 991 (7th Cir. 2001) (concluding that an inadmissible alien's "continued detention does not violate due process"), *cert. denied*, 123 S. Ct. 185 (2002); *with Rosales-Garcia v. Holland,* 322 F.3d 386, 408 (6th Cir. 2003) (*en banc*) (applying the reasonableness limitation that the Supreme Court read into § 1231(a)(6) in *Zadvydas* to inadmissible aliens), *cert. denied*, 71 U.S.L.W. 3652, 3787, 3789 (U.S. June 23, 2003) (No. 02-1464); *Xi v. I.N.S.,* 298 F.3d 832, 837-39 (9th Cir. 2002) (same).[16] Although a circuit split exists, the Supreme Court has denied certiorari in cases representing both viewpoints.

This case, however, requires us to join the debate and determine whether unadmitted aliens, post-*Zadvydas,* may be detained indefinitely under § 1231(a)(6). To do so, we first discuss why Benitez remains an inadmissable alien and then whether inadmissible aliens have a constitutional right to be free from indefinite detention. We then examine whether the reasonableness component, as read

[16] The Sixth Circuit decision in *Rosales* was the result of an interesting procedural history. The district court denied the petitioner's § 2241 petition. The Sixth Circuit reversed the district court on January 31, 2001, and concluded that the indefinite detention of inadmissible aliens violates the Fifth Amendment. Following *Zadvydas,* the government petitioned the Supreme Court for certiorari, requesting that the Sixth Circuit's decision be vacated and remanded in light of *Zadvydas.* The Supreme Court granted the government's motion and vacated and remanded the case for reconsideration in light of *Zadvydas.* The Sixth Circuit then heard the case on remand *en banc* and concluded that the Supreme Court's interpretation of § 1231(a)(6) applied to all classes of aliens. The Supreme Court then denied certiorari.

into § 1231(a)(6) by the Supreme Court in *Zadvydas,* applies to inadmissible aliens.

D. Benitez Is an Inadmissible Alien

Because the status of the alien affects the issues herein, we begin by confirming Benitez's alien status. Although Benitez has been present physically in the United States for more than 20 years, we readily conclude that Benitez never formally has been admitted and remains an inadmissable [sic] alien.

As mentioned above, Benitez arrived in the United States as part of the Mariel boat-lift, was stopped at the border, and paroled into this country. He was paroled because Congress has recognized that it is often necessary to permit arriving aliens, such as Benitez, to make a temporary, unofficial entry into the United States pending the resolution of their applications. *See Mezei,* 345 U.S. at 215; *see also* 8 U.S.C. § 1225(b) (alien who does not appear to examining immigration officer to be entitled to land may be detained for further inquiry); 8 U.S.C. § 1182(d)(5)(A) (granting authority to the Attorney General to parole aliens seeking admission into the United States, but providing that parole does not constitute an admission of the alien). Furthermore, the Supreme Court has rejected claims that the parole or detention of an unadmitted alien has any effect on the alien's status under the law. *See Leng May Ma v. Barber,* 357 U.S. 185, 1886 (1958).[17] Because an alien's legal status is not altered by

[17] In *Leng May Ma,* the Supreme Court noted that "[f]or over a half century this Court has held that the detention of an alien in custody

(Continued on following page)

detention or parole, it is clear that Benitez is, and remains, an inadmissable alien and is similar to any other alien who has not gained entry and is stopped at this country's border. *See Jean v. Nelson,* 727 F.2d 957, 969-70 (11th Cir. 1984) (*en banc*).

Any discussion of Benitez's rights in the immigration context must also start with the fundamental difference in the legal status of (1) unadmitted aliens and (2) resident aliens who have effected "entry" into the United States, whether illegally or legally. This critical difference not only was recognized in *Zadvydas,* but has been a hallmark of immigration law for more than a hundred years. For example, in *Leng May Ma,* the Supreme Court emphasized that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality." 357 U.S. at 187. The Supreme Court continued that "[i]n the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'" *Id.* (quoting *Mezei,* 345 U.S. at 212).

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pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." 357 U.S. at 188. Likewise, the Supreme Court explained that "[t]he parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status. . . . " *Id.* at 190; *see also Mezei,* 345 U.S. at 215 (alien permitted to enter pending a decision on admissibility "is treated as if stopped at the border"). This principle has become known as the "entry doctrine" fiction.

The Supreme Court further has explained that aliens seeking admission, such as Benitez, have no constitutional rights regarding their applications for admission. *See Landon v. Plasencia,* 459 U.S. 21, 32 (1982) ("[A]n alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); *Kwong Hai Chew v. Colding,* 344 U.S. 590, 600 (1953) ("'excludable' aliens . . . are not within the protection of the Fifth Amendment"); *Bridges v. Wixon,* 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("The Bill of Rights is a futile authority for an alien seeking admission for the first time to these shores.").

E. Constitutional Analysis

Against this background, we now examine whether, post-*Zadvydas,* the indefinite detention of an inadmissable alien, like Benitez, violates the Constitution. As mentioned above, the Supreme Court in *Mezei* expressly addressed the government's authority to detain indefinitely unadmitted aliens. Mezei had lived in the United States for approximately 25 years. 345 U.S. at 208. He left the United States in 1948, without authorization or reentry papers, and resided in Hungary for 19 months. *Id.* He then attempted to return to the United States. *Id.* The United States refused to admit Mezei into the country, and he was detained indefinitely on Ellis Island.

Because Mezei had voluntarily left the country, the Supreme Court had "no difficulty in holding respondent an

entrant alien or 'assimilated to [that] status' for constitutional purposes." *Mezei,* 345 U.S. at 214 (quoting *Kwong Hai Chew v. Colding,* 344 U.S. 590, 599 (1953)). The Supreme Court also stated that:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.

Mezei, 345 U.S. at 212 (internal citations and quotation marks omitted). The Supreme Court concluded that the unadmitted alien's continued, even indefinite, detention did not deprive him of any statutory or constitutional rights. *Id.* at 215.

This Court, sitting *en banc,* also has addressed the constitutional rights of inadmissible aliens in the context of indefinite detention. In *Jean v. Nelson,* 727 F.2d 957 (11th Cir. 1984) (*en banc*), this Court considered a group of Haitian aliens who were inadmissible and were being detained at various INS facilities pending a final determination of the merits of their individual asylum claims. After noting "the fundamental distinction between the legal status of excludable or unadmitted aliens and aliens who have succeeded in effecting an 'entry' into the United States," this Court concluded that "[a]liens seeking admission to the United States . . . have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress." *Jean,* 727 F.2d at 967-68.

This Court then addressed the concerns of the critics of a policy or legal system that allowed for the indefinite detention of aliens. In *Jean,* this Court noted that

> [s]ome courts and commentators have suggested that when an exercise of the government's power to exclude results in an indefinite detention of an excludable alien, at some point the continued imprisonment becomes punishment, regardless of the legal justifications or fictions involved. These authorities contend that at this juncture the government should be required to make some justification to continue to detain the alien.

Id. at 974. The *Jean* Court concluded "that we must resist the temptation to tamper with the authority of the Executive by ruling that excludable aliens have constitutional rights [against indefinite detention], even with regard to their applications for parole." *Id.* at 975.

The *Jean* decision is based on *Mezei.* Although *Mezei* has been criticized heavily by academic commentators, it remains good law. As mentioned above, *Mezei* is distinguished and preserved, but is not overruled, in *Zadvydas. See Zadvydas,* 533 U.S. at 693-94. As *Mezei* remains valid precedent, so does *Jean.* Consequently, we conclude that inadmissible aliens, like Benitez, have no constitutional rights precluding indefinite detention. *See, e.g., Borrero,* 325 F.3d at 1007-08; *Rios,* 324 F.3d at 297; *Hoyte-Mesa,* 272 F.3d at 991.

F. Statutory Right under § 1231(a)(6)

Although Benitez does not have a constitutional right precluding indefinite detention, we also must consider

whether he has a statutory right under § 1231(a)(6), post-*Zadvydas,* prohibiting indefinite detention. As previously mentioned, a circuit split has developed as to the breadth of *Zadvydas*'s holding. The Fifth, Seventh, and Eighth Circuits have concluded that *Zadvydas* does not affect the government's long-standing authority to detain indefinitely unadmitted aliens. Although three circuits have so concluded, the Fifth Circuit in *Rios* and the Seventh Circuit in *Hoyte-Mesa* do not engage in any statutory analysis of how § 1231(a)(6) must be read after *Zadvydas.* Rather, they simply conclude that *Zadvydas* did not overrule *Mezei* and, therefore indefinite detention of unadmitted aliens is permissible. This conclusion, however, begs the separate question of statutory construction and whether the Supreme Court's interpretation of § 1231(a)(6) in *Zadvydas* must now apply uniformly to all types of aliens.

The Eighth Circuit in *Borrero* specifically does address the statutory issue of whether the *Zadvydas* Court's statutory construction of § 1231(a)(6) as containing a "reasonableness" component must apply categorically to all aliens, regardless of the alien's legal status. *Borrero,* 325 F.3d at 1005-07. The Eighth Circuit concluded that *Zadvydas*'s narrowing construction of § 1231(a)(6) does not limit the government's statutory authority to detain unadmitted aliens "[b]ecause the detention of unadmitted aliens does not raise the same constitutional concerns as does the detention of admitted aliens." *Id.* at 1005. The Eighth Circuit stressed that "[t]he constitutional issue avoided in *Zadvydas* is simply not present in the context of aliens who have not effected an entry into the United States." *Id.* at 1007.

In doing so, the Eighth Circuit expressly rejected alien Borrero's argument that the same statutory construction of § 1231(a)(6) must apply "categorically to all future cases whether or not the circumstances raise the same constitutional questions." *Borrero,* 325 F.3d at 1007. The Eighth Circuit acknowledged that the Ninth and the Sixth Circuits have taken the view that the same construction must apply, but the Eighth Circuit disagreed for several reasons. *Id.*

First, the Eighth Circuit "interpret[ed] *Zadvydas* as limiting the detention of only those aliens whose detention raises serious constitutional doubt – admitted aliens." *Borrero,* 325 F.3d at 1007. Second, the Eighth Circuit emphasized that "*Zadvydas* itself does not mandate uniform application of § 1231(a)(6) to all aliens." *Id.* The Eighth Circuit reached this conclusion based, in part, on the Supreme Court's notation that "'terrorism or other special circumstances' may justify greater deference to Congress and the Executive." *Id.* (quoting *Zadvydas,* 533 U.S. at 697). Third, the Eighth Circuit stressed how *Zadvydas* "expressly distinguished *Mezei* on the grounds that Mezei had not made an entry into the United States." *Borrero,* 325 F.3d at 1007. Based on these reasons, the Eighth Circuit concluded that "*Zadvydas*'s six-month presumption of reasonableness is inapplicable to inadmissable [sic] aliens." *Id.*

We find the Eighth Circuit's reasoning persuasive and interpret *Zadvydas* as limiting the detention period of only those aliens whose continued confinement raises serious constitutional doubt, i.e., resident aliens who have effected entry. *See id.; Xi,* 298 F.3d at 841-42 (9th Cir. 2002) Rymer, J., dissenting). *But see Rosales-Garcia,* 322 F.3d at 408; *Xi,* 298 F.3d at 837-39. In addition to the rationale given by

the Eighth Circuit in *Borrero,* we adopt this view for several other reasons.

First, *Zadvydas* reads like an as-applied constitutional challenge where the Supreme Court repeatedly stated that its holding would not necessarily apply to other situations. As previously stated, *Zadvydas* opens with the statement that "[a]liens who have not gained initial admission to this country would present a very different question." *Zadvydas,* 533 U.S. at 682. Because *Zadvydas* was qualified in so many respects and reads like an as-applied decision, we conclude that the Supreme Court left the law, and it seems to us the statutory scheme too, intact with respect to inadmissible aliens who never have been admitted into the United States.

Second, as does the dissent in the Ninth Circuit's *Xi* decision, we "take the Supreme Court at its word: while indefinite detention raises serious constitutional questions in the case of aliens who have been admitted to the United States, '[a]liens who have not yet gained initial admission to this country would present a very different question.'" *Xi,* 298 F.3d at 840 (Rymer, J., dissenting) (quoting *Zadvydas,* 533 U.S. at 682). As does the *Xi* dissent, we reject the argument that *Zadvydas* leaves us little choice but to apply § 1231(a)(6) uniformly to all aliens. *See Xi,* 298 F.3d at 841 (Rymer, J., dissenting). As aptly stated by Judge Rymer, "[w]e do have a choice because the Court's interpretation was discrete as to *admitted* aliens" and "[i]t was driven by the need to avoid constitutional problems that pertain to those who are admitted – but that do not pertain to those who are *not* admitted." *Id.* We further agree with Judge Rymer that "[t]he result is a nuanced interpretation of § 1231(a)(6) that keeps it from being applied unconstitutionally but otherwise leaves it alone.

When a statute has different applications, it is not necessary to say that it is categorically infirm; it is only the constitutionally problematic aspects which are subject to the construction that avoids the problem." *Id.*

Third, *Zadvydas* emphasizes: "Nor do the cases before us require us to consider the political branches' authority to control entry into the United States. Hence we leave no 'unprotected spot in the Nation's armor.'" *Zadvydas,* 533 U.S. at 695-96 (citation omitted). The ability to exclude aliens from this country at its borders is a duty entrusted to the Executive Branch so that it may protect the citizens and residents of this country from all manner of nameless dangers. Creating a right to parole for unadmitted aliens after six months would create an unprotected spot in this country's defense of its borders. For example, it may be the case that the government will not be able to determine what potential dangers a particular unadmitted alien might pose. In such a situation, the government historically has enjoyed broad latitude in detaining those aliens until their security threat can be fully ascertained. Removing this important tool from the government's arsenal undoubtedly would subject the residents of this nation to greater security risks.

Moreover, in the instant case, the government *already* has determined that Benitez poses a danger to the community and is likely to engage in further violent behavior, and therefore is a security threat. Benitez engaged in serious criminal conduct while paroled into this country. Even after his parole was revoked based on his criminal convictions, the INS again issued a Notice of Releaseability, but later revoked that Notice based on its determination that Benitez still refused to conform his conduct to the laws of this nation. In light of Benitez's criminal history,

requiring Benitez's release after six months' detention does, in fact, create the very "unprotected spot in the Nation's armor" that the Supreme Court sought to avoid in *Zadvydas*. *See Xi,* 298 F.3d at 842 (Rymer, J., dissenting). We decline to read § 1231(a)(6) so as to deprive the Executive Branch of this authority absent an express statement from the Supreme Court to the contrary.

Fourth, ideally Benitez should be returned as soon as possible to his own country. However, this cannot happen if his own country will not allow it. Congress has given the Attorney General the discretion to detain or parole persons who are not admitted into this country and whose own country will not take them back. In light of the fact that the Supreme Court in *Zadvydas* went to such great lengths to distinguish inadmissible aliens, we shall not fetter that discretion by presumptively requiring their release into this country after six months. As stated by Judge Rymer, "Congress did not prescribe it, nor does a serious constitutional doubt compel it, and we have no call to construe § 1231(a)(6) to contain this limitation for inadmissible aliens." *Xi,* 298 F.3d at 843 (Rymer, J., dissenting).

Fifth and finally, reading § 1231(a)(6) as creating a right to parole into this country after six months for inadmissible aliens is undoubtedly a drastic expansion of the rights of inadmissible aliens, who have never gained entry into this country. It is without question that Congress had a contrary intention when enacting IIRIRA: it sought to tighten immigration regulations. As the very language of IIRIRA mandates, courts are not to construe IIRIRA to "create any substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. § 1231(h). It is also clear that Congress intended the use of the term

"inadmissibility" to subject removable aliens to the same potential for indefinite detention – if they could not be removed after the commission of a serious crime – to which excludable aliens had been subject both statutorily and constitutionally for years. *See*, *e.g.*, S. Rep. 104-249, 1996 WL 180026 at ("The opportunity that U.S. immigration law extends to aliens to enter and remain in this country is a privilege, not an entitlement.").

Inadmissible aliens such as Benitez never truly have resided in this country free from restraint. Rather, Congress has bestowed on them the luxury of parole while their immigration applications and status are finalized. To pervert this gift from Congress into a right after six months not only would distort Congress's intent and potentially create grave security concerns for the people of the United States, but also would create needless difficulties in how the INS processes aliens. Because *Zadvydas*'s holding is qualified in so many regards, and there is no need to construe § 1231(a)(6) to avoid constitutional due process concerns for inadmissible aliens, the government has the authority under § 1231(a)(6) to detain inadmissable aliens indefinitely and *Zadvydas*'s six-month presumption of reasonableness is inapplicable to inadmissible aliens.

III. CONCLUSION

For all the above reasons, we affirm the district court's denial of Benitez's § 2241 petition.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 02-14324

District Court Docket No.
02-00019-CV-5-19-MMP

DANIEL BENITEZ,

Petitioner-Appellant,

versus

ROBERT WALLIS,
Director INS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: July 17, 2003
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

Office of the Clerk

Supreme Court of the United States
Washington, D.C. 20543-0001

January 16, 2004

John S. Mills
Mills & Carlin
865 May St.
Jacksonville, FL 32204

Re: 03-7434 Benitez v. Wallis

Dear Mr. Mills:

The Court today entered the following order in the above stated case:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, February 25, 2004. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 26, 2004. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 19, 2004. Rule 29.2 does not apply."

Sincerely,

WILLIAM K. SUTER, CLERK

/s/ D. J. McNerney
Merits Cases Clerk
Phone: 202-479-3032/ Fax: 479-3204
djmerits@scus.gov

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(12)

No. 03-7434

Supreme Court, U.S.
FILED
FEB 25 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, Interim Field Office Director, Miami, Bureau of Immigration and Customs Enforcement,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court interpreted the phrase "may be detained beyond the removal period" in 8 U.S.C. § 1231(a)(6) to authorize the detention of an alien only as long as necessary to determine whether the alien's removal is reasonably foreseeable. The Court noted that the statute could also be construed to authorize indefinite and perhaps permanent detention, but it rejected this interpretation to avoid the significant constitutional question of whether the petitioners in that case, who had been formally admitted to live in the United States, could be subject to indefinite detention. The questions presented in this case are:

I. Whether the same language in 8 U.S.C. § 1231(a)(6) may be interpreted to have a different meaning for aliens who have been allowed to enter the United States on immigration parole than for aliens otherwise present, even though the statute does not distinguish between the two; and if so,

II. Whether interpreting 8 U.S.C. § 1231(a)(6) to authorize the indefinite detention of a paroled alien in Mr. Benitez's position would raise a sufficiently significant constitutional question to warrant interpreting the statute to avoid the question.

LIST OF PARTIES

Daniel Benitez is the Petitioner in this Court. The original respondent below (and the respondent listed in the caption of Mr. Benitez's petition for a writ of certiorari) was Robert A. Wallis, in his capacity as District Director, Immigration and Naturalization Service ("INS").

Effective March 1, 2003, however, the INS was replaced by the Bureau of Immigration and Customs Enforcement ("ICE") within the newly created Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (codified at 6 U.S.C. § 251(2)). According to the Response to the Petition for a Writ of Certiorari, John Mata, in his capacity as Interim Field Office Director, Miami for ICE, has succeeded Mr. Wallis. Thus, by operation of this Court's Rule 35.3, Mr. Mata is the proper Respondent.

For the sake of simplicity, this brief uses the term "Government" to refer to, as the context requires, Mr. Wallis, Mr. Mata, the INS, or the ICE. The distinction is not relevant to the issues in this proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Historical Context: The Mariel Boatlift	2
B. Mr. Benitez's History	5
C. Procedural History	7
D. Authority for Detaining an Alien Subject to a Removal Order	9
SUMMARY OF ARGUMENT	15
ARGUMENT	21
I. BECAUSE § 1231(A)(6) DOES NOT DISTINGUISH BETWEEN PAROLEES AND OTHER ALIENS, THIS COURT'S INTERPRETATION OF THE STATUTE IN *ZADVYDAS* SHOULD APPLY EQUALLY TO ALL ALIENS	22
A. This Court's interpretation of § 1231(a)(6) in *Zadvydas* should be the final word	23
(1) In *Zadvydas*, this Court held that the language "may be detained beyond the removal period" authorizes detention only as long as necessary to determine whether removal is reasonably foreseeable	23

TABLE OF CONTENTS – Continued

Page

(2) This Court's interpretation of § 1231(a)(6) in *Zadvydas* was the result of thorough interpretive analysis 26

B. The meaning of statutory language should not change depending on the person to whom it is applied 29

C. The grounds relied upon by the courts that have interpreted § 1231(a)(6) differently for parolees do not withstand scrutiny..... 32

(1) This Court's statements that more deference to Congress and the Executive might be justified in other circumstances had no bearing on the Court's interpretive analysis..... 32

(2) *Zadvydas* was not an "as-applied constitutional challenge." 34

(3) Mr. Benitez does not argue that § 1231(a)(6) gives him any right to parole, only that it does not authorize the permanent deprivation of his general right to be free from detention..... 35

II. INTERPRETING § 1231(A)(6) TO AUTHORIZE THE INDEFINITE DETENTION OF A PAROLED ALIEN WOULD RAISE A SUFFICIENTLY SIGNIFICANT CONSTITUTIONAL QUESTION TO WARRANT INTERPRETING THE STATUTE TO AVOID THE QUESTION 37

A. The Fifth Amendment's Due Process Clause applies to the detention of paroled aliens 37

TABLE OF CONTENTS – Continued

Page

(1) The "entry fiction" has no application to Mr. Benitez's detention 33

(2) *Mezei* does not control in this case..... 44

B. The indefinite detention of paroled aliens like Mr. Benitez violates their right to substantive due process 46

(1) The governmental objectives sought to be accomplished by § 1231(a)(6) do not support indefinite detention 46

(2) Section 1231(a)(6) does not provide adequate procedural safeguards to support indefinite detention 48

(3) The right of paroled aliens like Mr. Benitez to be free from unjustified, indefinite detention does not leave our nation defenseless against hostile nations attempting to force dangerous foreign nationals on our shores 48

C. The indefinite detention of paroled aliens like Mr. Benitez violates their right to procedural due process..... 49

CONCLUSION..... 50

TABLE OF AUTHORITIES

Page

CASES

Borrero v. Aljets, 178 F. Supp. 2d 1034 (D. Minn. 2001), *rev'd*, 325 F.3d 1003 (8th Cir. 2003) 30

Borrero v. Aljets, 325 F.3d 1003 (8th Cir. 2003) 30, 32

Brown v. Gardner, 513 U.S. 115 (1994) 30

Chmakov v. Blackman, 266 F.3d 210 (3d Cir. 2001) 31

Demore v. Hyung Joon Kim, 538 U.S. 510 (2003) 28

Elmendorf v. Taylor, 23 U.S. (10 Wheat) 152 (1825) 24

Fernandez-Roque v. Smith, 622 F. Supp. 887 (N.D. Ga. 1985) ..... *passim*

French's Lessee v. Spencer, 62 U.S. (21 How.) 228 (1858) 31

Jean v. Nelson, 472 U.S. 846 (1985) 29, 40

Kaplan v. Tod, 267 U.S. 228 (1925) 13, 40

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) .. 38, 41, 44

Landon v. Plasencia, 459 U.S. 21 (1982) 14

Leng May Ma v. Barber, 357 U.S. 185 (1958) 13, 40

Lin Guo Xi v. INS, 298 F.3d 832 (9th Cir. 2002) 24, 25, 30, 31, 34

Mathews v. Diaz, 426 U.S. 67 (1976) 18, 38, 40, 41

Nishimura Ekiu v. United States, 142 U.S. 651 (1892) 41

Orozco v. Texas, 394 U.S. 324 (1969) 29

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 29

Plyler v. Doe, 457 U.S. 202 (1982) 38, 41

TABLE OF AUTHORITIES – Continued

Page

Pollgreen v. Morris, 496 F. Supp. 1042 (S.D. Fla. 1980), *vacated*, 770 F.2d 1536 (11th Cir. 1985) 2, 3

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 24

Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 123 S. Ct. 2607 (2003) 30, 31

Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993) 14

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) ..... *passim*

United States v. Frade, 709 F.2d 1387 (11th Cir. 1983) 2, 3, 4

United States v. Ju Toy, 198 U.S. 253 (1905) 41

United States v. Salinas, 522 U.S. 52 (1997) 28

United States v. Witkovich, 353 U.S. 194 (1957) 26

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) 29

Wong Wing v. United States, 163 U.S. 228 (1896) 19, 42

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 38, 41

Zadvydas v. Davis, 533 U.S. 678 (2001) ..... *passim*

CONSTITUTIONAL PROVISIONS

United States Constitution, amend. V ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 ..... 6, 43

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3546 ..... 14, 35

Refuge Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 43

8 U.S.C. § 1182 10

8 U.S.C. § 1182(a) 14

8 U.S.C. § 1182(a)(2)(B) 7

8 U.S.C. § 1182(a)(4)(A) 47

8 U.S.C. § 1182(a)(5)(A)(i) 47

8 U.S.C. § 1182(a)(6) 15

8 U.S.C. § 1182(a)(7)(A)(i)(I) 6, 43

8 U.S.C. § 1182(a)(7)(A), (B) 47

8 U.S.C. § 1182(a)(8)(B) 47

8 U.S.C. § 1182(a)(9) 6

8 U.S.C. § 1182(a)(10)(A) 47

8 U.S.C. § 1182(a)(10)(B) 47

8 U.S.C. § 1182(a)(10)(D) 47

8 U.S.C. § 1182(a)(10)(E) 47

8 U.S.C. § 1182(d)(5) 5, 38, 39, 40

8 U.S.C. § 1225(a)(1) 14

8 U.S.C. § 1226(c) 27, 28

8 U.S.C. § 1227(a) 14

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. § 1227(a)(1)(C) 1, 10

8 U.S.C. § 1227(a)(2) 1, 10

8 U.S.C. § 1227(a)(4) 1, 10

8 U.S.C. § 1229a 14

8 U.S.C. § 1231 10

8 U.S.C. § 1231(a)(1)(A) 10

8 U.S.C. § 1231(a)(1)(B)(iii) 10

8 U.S.C. § 1231(a)(2) 10, 27

8 U.S.C. § 1231(a)(3) 36

8 U.S.C. § 1231(a)(6) ..... *passim*

8 U.S.C. § 1231(h) 35

8 U.S.C. § 1251(a) 14

8 U.S.C. § 1253(b) 36

8 U.S.C. § 1255 ..... 6, 43

8 U.S.C. § 1537(b)(2)(C) 27, 33

28 U.S.C. § 1254 1

28 U.S.C. § 2241 7

REGULATIONS

8 C.F.R. § 212.12(b)(1) 48

8 C.F.R. § 212.12(d)(2) 47

8 C.F.R. § 241.4(d)(1) 48

8 C.F.R. § 241.13 15

8 C.F.R. § 241.13(3)(i) 15, 41

TABLE OF AUTHORITIES – Continued

Page

8 C.F.R. § 241.5 36

45 Fed. Reg. 28,079 (Apr. 14, 1980) 2

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OPINIONS BELOW

The decision of the court of appeals (J.A. 59-83) is reported at 337 F.3d 1289. Neither the opinion of the district court (J.A. 44-49) nor the report and recommendation of the magistrate judge (J.A. 37-43) is reported.

JURISDICTION

By order dated January 16, 2004, this Court granted Mr. Benitez's Petition for a Writ of Certiorari and took jurisdiction under 28 U.S.C. § 1254 to resolve a circuit split.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides, in relevant part, "No person shall be . . . deprived of . . . liberty . . . without due process of law."

Section 241(a)(6) of the Immigration and Naturalization Act, 8 U.S.C. § 1231(a)(6) (2001), provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

STATEMENT OF THE CASE

A. Historical Context: The Mariel Boatlift

On April 1, 1980, six Cubans in a bus crashed through the gates of the Peruvian embassy in Havana, Cuba under heavy fire from Cuban security forces. Alex Antón & Roger E. Hernández, *Cubans in America: A Vibrant History of a People in Exile* 201 (2002). They sought and received political asylum from the Peruvian government. *Id.* In response, Fidel Castro announced that anyone desiring to leave Cuba should go to the Peruvian Embassy. *Id.* Within three days, over 10,000 Cuban citizens crowded the embassy grounds and were granted asylum. *Id.* at 201-02; *United States v. Frade*, 709 F.2d 1387, 1389 (11th Cir. 1983). The Cuban government then sealed the area and blocked humanitarian assistance to those inside. Antón & Hernández, *supra*, at 202-03.

The Carter Administration here in the United States determined that these Cubans could be considered refugees even though they were still in Cuba and, citing "grave humanitarian needs" and the "national interest," determined that up to 3500 of them could be admitted to the United States for resettlement under the Refugee Act of 1980. 45 Fed. Reg. 28,079 (Apr. 14, 1980); *see also Frade*, 709 F.2d at 1389; *Pollgreen v. Morris*, 496 F. Supp. 1042, 1047 (S.D. Fla. 1980), *vacated*, 770 F.2d 1536 (11th Cir. 1985). An airlift of some of these Cubans began shortly thereafter, but was promptly suspended by Castro. *Frade*, 709 F.2d at 1389; Antón & Hernández, *supra*, at 204. Castro then announced that he would allow any Cuban citizens who wanted to leave to depart Cuba from the port city of Mariel. *Frade*, 709 F.2d at 1389; Antón & Hernández, *supra*, at 204.

In what has come to be known as the "Mariel Boatlift" or the "Freedom Flotilla," over 120,000 "Mariel Cubans"[1] made the ninety-mile journey across the Florida Straits to the United States between April and October of 1980. *Frade*, 709 F.2d at 1389; *Pollgreen*, 496 F. Supp. at 1047.

During a famous appearance before the League of Women Voters on May 5, 1980, United States President Jimmy Carter was asked what his administration intended to do about enforcing immigration laws in response to the massive exodus. *Pollgreen*, 496 F. Supp. at 1047; *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 897 & n.16 (N.D. Ga. 1985). President Carter responded by noting that this crisis stemmed from the "inhumane approach by Fidel Castro" and stated that the United States was "the most generous nation on Earth in receiving refugees, and I feel deeply that this commitment should be maintained." *Fernandez-Roque*, 622 F. Supp. at 897 n.16. President Carter announced:

> [L]iterally tens of thousands of [Cubans] will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law. . . .
>
> . . . . [W]e'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.

Id.

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[1] Mariel Cubans are sometimes referred to by the term "Marielitos," but that term is considered pejorative. *See, e.g.*, Antón & Hernández, *supra*, at 212; Myra Mendible, *Paradise Lost, Paradise Found: Oral Histories and the Formation of Cuban Identities*, 55 Fla. L. Rev. 269, 270 n.7 (2003).

President Carter's remarks about our country's "open heart and open arms" were "broadly interpreted as governmental approval of the boatlift." *Id.* at 898 (quoting *Frade*, 709 F.2d at 1395). The *New York Times* ran a front-page story the next day with the headline "President Says U.S. Offers 'Open Arms' to Cuban Refugees: Warm Reception Is Promised." *Id.* His remarks were also publicized in the May 18, 1980, edition of *Granma*, Cuba's official newspaper. *Id.* at 897.

The more than 120,000 Mariel Cubans who came to America during this time can be divided into two groups. The vast majority were ordinary citizens with no criminal past. Antón & Hernández, *supra*, at 206. Unlike many earlier Cubans who had fled after Castro's revolution, the Mariel Cubans were mostly blue-collar, working-class people "with little business or professional experience." *Id.* at 208. At any rate, the large majority of Mariel Cubans were screened by the Government upon their arrival and were immediately paroled into the United States.[2] *Fernandez-Roque*, 622 F. Supp. at 895.

On the other hand, less than two percent (around 2,000 out of more than 120,000) were detained because they either had severe mental problems or serious criminal records in Cuba. *Id.* at 893 & 895 n.11; Antón & Hernández, *supra*, at 206. It is widely believed that the Castro regime had forced these people on board some of the boats leaving

[2] For example, although it does not appear in the record developed by Mr. Benitez while he was *pro se*, Mr. Benitez and the others on his boat were welcomed by the Coast Guard as they came into the harbor in Key West and provided food and beds for their first night on American soil. The very next day, they were driven to Miami, and Mr. Benitez was immediately allowed to join his family. He was not put into immigration detention at all until 2001.

Mariel along with the thousands of regular Cuban citizens who fled the country. *Fernandez-Roque*, 622 F. Supp. at 893; Antón & Hernández, *supra*, at 205-06.

This small minority has fostered false perceptions and prejudice against the Mariel Cubans, both by the previously established Cuban exile community and by the general United States population. *See* Antón & Hernández, *supra*, at 206 (explaining how media coverage of this small minority "created the stereotype of the crazed, homicidal Mariel Cuban"); *see also* Liz Balmaseda, *A Wall Fell Between Cubans on Island, Cubans in Miami*, Miami Herald, Apr. 23, 2000, at 1L ("The very image the Cuban government had put out about those departing via Mariel – that they were 'scum,' delinquents, social misfits – was propagated by some of Castro's most strident opponents in exile. In their haste to save their own image, exiles bought into Castro's labels.").

The exodus from Mariel ended on September 25, 1980, when Castro shut down the harbor. Antón & Hernández, *supra*, at 207.

B. Mr. Benitez's History

Mr. Benitez arrived in Key West on June 26, 1980, and was paroled into the United States, pursuant to 8 U.S.C. § 1182(d)(5) (1976 & Supp. IV 1980), which authorized parole "for emergent reasons or for reasons deemed strictly in the public interest." (J.A. 27; Answer Exh. A.)

Three years later in June 1983, Mr. Benitez was charged in state court in Miami for grand theft. (Answer Exh. B.) The police report included in the record indicates that he had purchased stereo speakers that he knew to be stolen. (*Id.*) He paid $60 for the speakers, knowing them to be worth more than $400. (*Id.*) The state court withheld

adjudication of guilt and sentenced Mr. Benitez to probation for three years. (*Id.*)

Mr. Benitez subsequently applied to the INS to have his status adjusted to lawful permanent resident,[3] but the application was denied in 1985 because of his 1983 grand theft conviction, which prevented him from being admissible pursuant to 8 U.S.C. § 1182(a)(9). (Answer Exh. C.)

Mr. Benitez was convicted for the second and last time in April 1993. (Answer Exh. E.) He pleaded guilty to a multi-count indictment that alleged that he was involved with three other individuals in the armed robbery of two men in Miami on the same day in November 1991. (*Id.*) The indictment was returned generally against all four and did not specify who did what. (*Id.*) The value of the items stolen (cash, a wallet, sunglasses, and a watch) was approximately $600. (*Id.*) A concealed firearm with an altered serial number was used. (*Id.*) The state court in Miami sentenced Mr. Benitez to twenty years in state prison. (*Id.*)

In June 1993, while Mr. Benitez was serving his sentence, the Government revoked his immigration parole because his "continued parole [was] determined to be against the public interest." (Answer Exh. F.) After a duly noticed hearing, an immigration judge found Mr. Benitez to be excludable and ordered him deported. (Answer Exh. G.) He was excludable under 8 U.S.C. § 1182(a)(7)(A)(i)(I) because, like most of the Mariel Cubans, he had not obtained a visa when he entered the United States in

[3] The Cuban Refugee Adjustment Act of 1966 authorized the Attorney General to adjust the status of certain Cuban citizens paroled into the United States after 1958. Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255, historical and statutory notes).

1980. (Answer Exh. G.) He was also excludable under 8 U.S.C. § 1182(a)(2)(B) because he had multiple criminal convictions with an aggregate term of confinement in excess of five years. (*Id.*) Mr. Benitez waived his right to appeal the order of removal. (*Id.*)

Mr. Benitez completed his state sentence on July 27, 2001, and was immediately taken into custody by immigration officials.[4] (J.A. 5.) He again received notice that his parole had been revoked, but he was advised that the Cuban Review Panel would interview him to determine "whether it is in the public interest for [him] to be released from Service Custody." (Answer Exh. I.)

After the interview, the panel issued a Notice of Releasability dated December 12, 2001, which determined that Mr. Benitez was "releasable under the criteria established by the Cuban Review Plan" and that "efforts to find a suitable sponsorship or placement for [him] shall continue." (Answer Exh. J.)

C. Procedural History

On January 11, 2002, a few days before Mr. Benitez received the Notice of Releasability (*id.*), he filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. (J.A. 3-26.) He asserted that the Government was detaining him pursuant to 8 U.S.C. § 1231(a)(6), but that in *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court had interpreted that statute to preclude detention once it becomes clear that an alien cannot be removed in the

[4] The Eleventh Circuit mistakenly stated that the transfer occurred in October 2001. (J.A. 63.)

reasonably foreseeable future. (J.A. 8-25.) Mr. Benitez alleged that the Government would be unable to deport him in the reasonably foreseeable future because it had no repatriation agreement with Cuba. (J.A. 5.) He further alleged that the Government's detention violated his constitutional rights. (J.A. 5, 8-25.)

The petition was referred to a magistrate judge who reviewed the petition and ordered the Government to file an answer justifying its detention of Mr. Benitez. (J.A. 1.) In its answer, the Government admitted that it was holding Mr. Benitez pursuant to § 1231(a)(6) and did not dispute Mr. Benitez's contention that he could not be deported in the reasonably foreseeable future. (J.A. 31-32, 66 n.12.) Instead, it contended that *Zadvydas* applied only to "aliens admitted to or present in the United States." (J.A. 33-34.) It argued that this decision did not apply to Mr. Benitez because he "never effected entry into the United States." (J.A. 33.) Even though he had been paroled into the country, the Government contended that because he never "adjusted his status to that of a lawful resident," Mr. Benitez "stands in the position of a person seeking admission or parole into the United States." (J.A. 30.) The Government also contended that Mr. Benitez had no constitutional right to release. (J.A. 31.)

The magistrate judge ultimately issued a report and recommendation finding that *Zadvydas* did not apply and that the Government did have the authority to detain Mr. Benitez indefinitely. (J.A. 37-43.) The district court adopted the report and recommendation and denied Mr. Benitez's habeas petition on July 11, 2002. (J.A. 44-49.)

Continuing to proceed *pro se*, Mr. Benitez timely appealed to the United States Court of Appeals for the Eleventh Circuit. (Record 14.) That court appointed counsel to represent Mr. Benitez. (Appointment Under Addendum

Five Filed March 12, 2003.) While the case was pending in the court of appeals, the INS issued a Notice of Release Withdrawal, which advised Mr. Benitez that he would not be released because he was "cited for planning an escape" from the state prison facility. (J.A. 52-53.) The Government filed this document with the court of appeals with a status report. (J.A. 51-54.) Mr. Benitez responded to this status report by explaining that he had nothing to do with any planned escape and had never been given an opportunity to respond to this allegation. (J.A. 55-58, 64 n.9.) The only connection between him and a group of inmates who apparently did plan an escape was that they were all of Hispanic origin. (J.A. 56.)

The court of appeals ultimately affirmed the district court's decision on July 17, 2003, in a per curiam decision. (J.A. 59-83.) Mr. Benitez filed a petition for a writ of certiorari on October 14, 2003. In its response to this petition, the Government advised that the Cuban Review Panel had again determined that Mr. Benitez was "a candidate for release" and that he would be placed in a substance abuse treatment facility. (Response at 8-9.)[5] This Court granted certiorari on January 16, 2004, setting the case for expedited briefing and argument.

D. Authority for Detaining an Alien Subject to a Removal Order

Section 1231 governs the detention, release, and removal of aliens who, like Mr. Benitez, have been ordered

[5] The Government further advised that Mr. Benitez's "placement is expected to be in a residential program in a federal facility, and that the placement is unlikely to occur before February 2004, or to be completed before July 2004." (Response at 9.)

removed from the country. 8 U.S.C. § 1231. Normally, the Attorney General is required to remove such an alien within ninety days. § 1231(a)(1)(A). In the case of an alien who is incarcerated when the removal order is entered, this ninety-day period begins to run on the date the alien is released. § 1231(a)(1)(B)(iii). Where, as here, the removal order is based on criminal convictions, the Attorney General must detain the alien during this removal period. § 1231(a)(2). Thus, Mr. Benitez's detention was mandated for ninety days following his release from state custody in July 2001.

The central statutory provision in this case is § 1231(a)(6), which authorizes detention beyond the removal period for all aliens who are not eligible for admission and certain other aliens who are also removable:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6) (emphasis added). This provision applies to Mr. Benitez because he has been determined to be inadmissible under 8 U.S.C. § 1182. There has been no determination that he is "a risk to the community or unlikely to comply with the order of removal."

Mr. Benitez has been detained now for over two-and-a-half years, which is well beyond the ninety-day removal period. This proceeding therefore turns on whether the language "may be detained beyond the removal period" authorizes indefinite, perhaps permanent, detention of paroled aliens like Mr. Benitez. The Government contends

that it does. Mr. Benitez contends that this language authorizes continued detention only for as long as is necessary to determine whether his removal is reasonably foreseeable.

This issue of statutory interpretation was before this Court in *Zadvydas v. Davis*, 533 U.S. 678 (2002). In that case, the Court held that an interpretation of § 1231(a)(6) that would allow indefinite detention "would raise a serious constitutional problem," at least with regard to aliens who have entered the United States. *Id* at 690. The Court reviewed its prior decisions that held that potentially indefinite detention may only be ordered, consistent with the Due Process Clause of the Fifth Amendment, "in a criminal proceeding with adequate procedural protections" or "in certain special and 'narrow' nonpunitive 'circumstances' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Id.* (citations omitted).

The Court recognized and rejected two potential "special justifications" offered by the Government in support of indefinite detention of aliens: (1) ensuring that the alien will appear when removal is possible and (2) preventing danger to the community. *Id.* The Court held that the flight risk justification was "weak or nonexistent" in cases where there is no reasonable likelihood that the alien's country will accept him back. *Id.* The Court rejected the second justification because it was not sufficiently narrow. *Id.* at 691 ("The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations.").

Although the Court acknowledged that there are administrative proceedings available to allow an alien to be released

from detention, it suggested that "greater procedural protections" may be required. *Id.* at 692. The available procedures were suspect because they placed the burden on the alien to prove that he is not dangerous and, at least in the Government's view, the administrative decision was largely immune from judicial review. *Id.* The Court concluded:

> The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.

Id.

The Court also rejected the Government's argument that "from a constitutional perspective, alien status itself can justify indefinite detention" under the Supreme Court's earlier decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). *Zadvydas*, 533 U.S. at 692. The Court noted that the parties had briefed the issue of whether "subsequent developments have undermined *Mezei*'s legal authority," *id.* at 694, but it declined to address this issue because *Mezei* was distinguishable. *Id.* at 693.

Mr. Mezei had previously lived in the United States, but had been out of the country for nearly two years. *Id.* at 692. When he returned to the country by boat at Ellis Island, he was denied admission and not allowed to return to his home in America. *Id.* Because no other country would accept him, he was detained on Ellis Island. *Id.* The *Mezei* court held that this detention did not violate the Constitution because he had not been formally admitted to enter the country. *Id.* The *Zadvydas* Court noted that this was an important distinction:

> We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question.

Id. at 682; *see also id.* at 693 (calling this distinction a difference "in a critical respect" between *Zadvydas* and *Mezei*).

The Court noted that Mr. Mezei's "presence on Ellis Island did not count as entry into the United States. Hence, he was 'treated,' for constitutional purposes, 'as if stopped at the border.'" *Id.* The Court also cited two prior cases where aliens were deemed not to have "entered" the country even though they were in fact allowed to enter. *Id.* (citing *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (alien arriving from Russia ordered excluded, but allowed to stay in the United States because war had broken out in Europe), and *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1958) (alien paroled into country pending determination of admissibility)).

Having distinguished *Mezei*, the Court ultimately concluded that "an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent." *Id.* at 696. It therefore turned to the issue of whether Congress had clearly intended for § 1231(a)(6) to authorize indefinite detention. After reviewing the language of the statute, the provisions of similar statutes, and the history of the immigration laws, *id.* at 697-99, the Court was unable to find "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed." *Id.* at 699.

Based on this analysis, the Court concluded that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. Thus, it held that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

Because this Court emphasized in *Zadvydas* that the aliens in that case had been lawfully admitted for entry into the United States, it left open the question of whether § 1231(a)(6) authorizes indefinite detention of inadmissible aliens. Inadmissible aliens can be divided into three separate groups: (1) aliens who have entered the country without inspection (e.g., by sneaking across the border),[6]

[6] These aliens, sometimes referred to by the acronym EWI ("entered without inspection"), have traditionally been treated as having entered the United States and have been grouped with admitted aliens as "deportable" and subject to "deportation" proceedings. 66 Fed. Reg. at 56,969; *see also* 8 U.S.C. § 1251(a) (1996) (providing grounds for deporting "[a]ny alien in the United States"). Aliens stopped at the border (even if subsequently paroled), on the other hand, were referred to as "excludable" and were subject to "exclusion" proceedings. 8 U.S.C. § 1182(a) (1996); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 159 (1993) ("Aliens arriving at the border, or those who are temporarily paroled into the country, are subject to an exclusion hearing. . . ."). *See generally Landon v. Plasencia*, 459 U.S. 21, 25-26 (1982) (explaining difference between deportation and exclusion).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3546 (Sept. 30, 1996), changed this terminology. Deportation and exclusion are now referred to as "removal." *See generally* 8 U.S.C. § 1229a (providing removal proceedings for both deportable and inadmissible aliens). The term "deportable" now applies only to aliens who have been formally admitted. 8 U.S.C. § 1227(a) (2003). The term "excludable" is no longer used, and "inadmissible" is now used to refer both to aliens stopped at the border (including parolees) and aliens who entered without inspection. *See generally* 8 U.S.C. § 1182(a) (setting forth aliens who are inadmissible, including (in subparagraph (6)) aliens who are present without inspection); *see also* 8 U.S.C. § 1225(a)(1) (aliens present in the United States without being formally admitted are treated as applicants for admission).

This brief uses the terms "parolee" and "paroled alien" to refer to aliens like Mr. Benitez who were allowed to physically enter the country, but were never formally admitted. In his certiorari petition and in the Eleventh Circuit, he used the term "non-admitted aliens" to mean the same thing. This term is discarded here to avoid confusing

(Continued on following page)

(2) arriving aliens stopped at the border, and (3) aliens who were inspected at the border and paroled into the country. Since *Zadvydas*, the Government has interpreted § 1231(a)(6) to authorize the indefinite detention of the latter two categories (arriving aliens and parolees), but not the first (illegal entrants). Determination of Whether There Is a Significant Likelihood of Removing, 8 C.F.R. § 241.13(3)(i) (2003); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,969 (Nov. 14, 2001).

Mr. Benitez challenges the Government's interpretation with regard to paroled aliens. In this case, the Government has not challenged Mr. Benitez's assertion that there is no significant likelihood of removal in the reasonably foreseeable future because the United States has no repatriation agreement with Cuba. Thus, the only issue in this appeal is whether this Court's interpretation of § 1231(a)(6) should apply with respect to the detention of aliens who, like Mr. Benitez, were paroled into the United States.

SUMMARY OF ARGUMENT

When the Government is unable to remove an alien from the United States because no country will take him, the Government contends that it has the authority under 8 U.S.C. § 1231(a)(6) to put that alien in prison for the rest of his life. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), however, this Court rejected that notion and held that § 1231(a)(6) does not authorize indefinite detention. Specifically, it held that the statute's provision that certain aliens "may be

parolees with EWI's, who are "inadmissible" pursuant to 8 U.S.C. § 1182(a)(6), but are covered by the holding in *Zadvydas* pursuant to 8 C.F.R. 241.13. 66 Fed. Reg. at 56,969.

detained beyond the removal period" authorized detention only as long as necessary to determine whether the alien's removal is reasonably foreseeable. It reached this interpretation to avoid the serious constitutional question of whether indefinite detention would violate the due process rights of an alien who had been admitted for permanent residence in this country. Even though the Court dealt in *Zadvydas* with admitted aliens, its interpretation of § 1231(a)(6) should apply both directly and indirectly to inadmissible aliens paroled into this country.

This Court's interpretation of § 1231(a)(6) in *Zadvydas* should apply directly to paroled aliens because the statute does not distinguish between admitted and paroled aliens. As an initial matter, even though this Court's reasoning in *Zadvydas* was driven in part by its desire to avoid having to determine whether the statute violates the constitutional rights of admitted aliens, it concluded that the statute does not authorize indefinite detention. While the reasoning was limited to concerns for admitted aliens, the holding was not. Indeed, the Court expressly noted that the statute also applies to aliens who have not been admitted, and Justice Kennedy specifically pointed out in his dissent that the Court's decision would apply to Mariel Cubans on parole.

Moreover, the Court's construction of § 1231(a)(6) was not the result of blind application of the avoidance doctrine. To the contrary, the Court carefully considered the relevant interpretive factors, such as the statute's plain language, its underlying purposes, language used in other statutes providing for detention, and the history of detention statutes in America. Based on this analysis, the Court concluded that its construction of the statute was reasonable. The Eleventh Circuit therefore erred in overlooking this analysis and substituting its own interpretation of § 1231(a)(6) for that of this Court.

The Eleventh Circuit (and the other lower courts reaching the same result) concluded that the same statutory language may be interpreted differently depending on the pedigree of the person to whom it is applied. Not only is there no precedent for this principle, it offends any sense of fairness or justice.

The Eleventh Circuit's reasoning in reaching this conclusion does not withstand scrutiny. The court seized on language in *Zadvydas* that "'terrorism or other special circumstances' may justify greater deference to Congress and the Executive," but it took this passage out of context. The quote passage appears in the constitutional analysis in *Zadvydas*, not the interpretive analysis. This Court did not suggest in any way that in reaching its interpretation of § 1231(a)(6) it was somehow defying or thwarting the intent of the political branches. The passage simply signals that if and when the Court is called to consider the constitutionality of another provision that specifically authorizes indefinite detention in narrow circumstances, the Court might be inclined to uphold it.

The Eleventh Circuit also suggested that *Zadvydas* was an "as-applied" constitutional challenge. A cursory review of this Court's opinion, however, belies the lower court's revisionism. If *Zadvydas* were an as-applied challenge, the Court would have, by necessity, reached the opposite interpretation of the statute. It would have held that the statute does authorize indefinite detention, but that it is unconstitutional as applied to admitted aliens.

Finally, the Eleventh Circuit recast Mr. Benitez's claim as one of entitlement to a right to parole. This Court rejected this very notion in *Zadvydas*. Mr. Benitez does not claim that § 1231(a)(6) gives him any rights, only that it does not extinguish his most basic human liberty interest. Moreover, Mr. Benitez does not contest the authority of the

Government to impose the strict conditions of supervision applicable to post-removal release. In no sense is he seeking the right to roam free in this country as a citizen or permanent resident. In short, the Eleventh Circuit could point to no legitimate reason for not directly applying this Court's holding in *Zadvydas* to Mr. Benitez's case.

Alternatively, even if *Zadvydas* does not directly control, it indirectly requires the same result for Mr. Benitez. If *Zadvydas* stands for anything, it is that when indefinite detention would raise a serious constitutional question, it must be interpreted to only authorize detention for as long as necessary to determine whether removal is reasonably foreseeable. *Zadvydas* also reaffirmed this Court's long-held view that the Due Process Clause generally applies to aliens. The only question is whether Mr. Benitez's status as an inadmissible, paroled alien vitiates his right to due process. It does not.

The Eleventh Circuit relied on the "entry fiction," a long-held legal fiction that an arriving alien who has been allowed to disembark and land on our shores is not deemed to have "entered" the country while his application for entry is being considered. This fiction should not apply in this case for no less than four reasons.

First, the fiction originated as a creature of statutory, not constitutional law. This Court has never applied it to deny constitutional protection to an alien that has been paroled into this country. When the Court has applied the doctrine to paroled aliens, it has been with regard to statutory rights and benefits. For example, in *Mathews v. Diaz*, 426 U.S. 67 (1976), this Court held that a paroled Cuban was not statutorily entitled to a benefit provided for admitted aliens. The Court went on, however, to analyze whether this statute violated the paroled alien's due process rights. While it concluded that there was no violation in that case,

its analysis demonstrates that, despite the entry fiction, the alien was protected by the Constitution.

Second, to the extent the entry fiction might apply as a constitutional concept, it should be limited to admission and removal decisions. This Court has held that aliens whom immigration officials allow to land on our soil at an immigration checkpoint do not acquire any constitutional rights with regard to whether they are admitted for entry or ordered removed. It has never held, however, that they have no rights regarding their treatment while in our country. To the contrary, the Court long ago held in *Wong Wing v. United States*, 1634 U.S. 228 (1896), that the treatment of an alien awaiting his removal is subject to the Due Process Clause.

The third and fourth reasons for not applying the entry fiction in this case result from Mr. Benitez's particular situation as a Mariel Cuban who was been paroled into this country. Unlike the applicants against whom the entry fiction has heretofore been applied, the Mariel Cubans came to this country at the invitation of our President. Moreover, in the case of Mariel Cubans, parole was used as a means of entry, not as a temporary measure while their applications were being considered. Thus, the entry fiction makes no sense in this case.

In applying the entry fiction, the Eleventh Circuit relied entirely on this Court's Cold War decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which approved of the indefinite detention of an arriving alien. *Mezei* does not control. First, unlike Mr. Mezei, Mr. Benitez lived continuously in the United States for over twenty years before he was detained. Second, Mr. Mezei was detained at his port of entry, while Mr. Benitez was allowed to enter the country and assimilate immediately after his arrival. Third, the Government specifically

determined that Mr. Mezei, who had just spent nearly two years behind the Iron Curtain, posed a national security risk, while it has determined that Mr. Benitez poses no risks. Finally, even if *Mezei* were on all fours, this Court's intervening due process jurisprudence has eroded the continuing viability of that decision.

Once the entry fiction is discarded in this case, then the reasoning in *Zadvydas* demonstrates that § 1231(a)(6) would raise serious constitutional questions if it were interpreted to authorize indefinite detention of paroled aliens like Mr. Benitez. In evaluating the constitutionality of indefinite detention under the statute in *Zadvydas*, this Court focused on the breadth of application of the statute, noting that it applied to many admitted aliens that did not pose any risks, such an alien who has simply overstayed his visa. The over-breadth concern is heightened in this case because the statute applies to a much broader range of inadmissible aliens, including those who are helpless, seeking a job, or are poor. Again, in the case of Mr. Benitez, the Government has specifically determined that he does not pose any risk to public safety. This finding provides further support for this Court's concerns in *Zadvydas* that § 1231(a)(6) provides inadequate procedural safeguards to support indefinite detention.

The Eleventh Circuit's constitutional reasoning was guided by concerns of national security in the event a rogue nation decided to unleash its most undesirable aliens on our shore. Inhumane treatment of human beings, however, is neither an appropriate response, nor the only alternative. The political branches have many tools to deal with attacks on our sovereignty: diplomatic responses including trade sanctions, as well as military options.

More importantly, however, Mr. Benitez does not contend that the United States lacks authority to detain arriving aliens. His challenge is limited to aliens for whom the Government made the conscious choice to allow to come into our country and live among us. The Mariel Boatlift demonstrates this dichotomy. The Government immediately detained the small minority of Mariel Cubans who it determined to be violent criminals. The authority to detain arriving aliens is not at issue. Thus, vindicating the human rights of Mr. Benitez and other paroled aliens will pose no risk to our national security.

Finally, even if the indefinite detention of Mr. Benitez does not violate his right to substantive due process, it is clear by now that his detention violates his right to procedural due process. Every procedure that he has been afforded has resulted in the determination that there is no good reason to detain him, yet he remains detained. It is time for this nightmare to end.

ARGUMENT

Mr. Benitez and about 125,000 other Cuban citizens were not legally eligible to come to the United States in 1980 because they did not have visas. They came anyway, and instead of turning them back, the United States welcomed them with an open heart and open arms. Even though these Mariel Cubans were not technically eligible to enter the United States, the Government decided to let them in anyway on immigration parole.

Like any other large population, a number of these Mariel Cubans committed crimes after their arrival. The Government elected to revoke their parole and ordered them to be returned to Cuba. The Government detained them by putting them in prison while it attempted to send them back. The Government contends that because Fidel

Castro will not take them, it has the statutory authority to keep these people imprisoned for the rest of their lives.

Daniel Benitez is one of these people. In support of its contention that it can imprison Mr. Benitez until he is dead, the Government relies on 8 U.S.C. § 1231(a)(6), which provides that any inadmissible alien and certain admitted aliens "may be detained beyond the [ninety-day] removal period."

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court interpreted this language to authorize detention for as long as necessary to determine whether the alien's removal is reasonably foreseeable. While *Zadvydas* dealt with aliens who had been legally admitted to the United States, this interpretation should also apply to aliens like Mr. Benitez who have not been legally admitted, but have been paroled into the country. As argued in Part I of this brief, the interpretation should apply directly because § 1231(a)(6) does not distinguish between different classes of aliens. Alternatively, as argued in Part II, it should apply indirectly because, as in *Zadvydas*, that interpretation is necessary to avoid a substantial constitutional question.

I. BECAUSE § 1231(A)(6) DOES NOT DISTINGUISH BETWEEN DIFFERENT CLASSES OF ALIENS, THIS COURT'S INTERPRETATION OF THE STATUTE IN *ZADVYDAS* SHOULD APPLY EQUALLY TO ALL ALIENS.

The Court should not reach any of the complex and important constitutional issues raised in Part II of this brief or in the various amicus briefs. This proceeding may be resolved by simply applying the interpretation of § 1231(a)(6) that this Court reached just a few years ago in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Because the key language in § 1231(a)(6) – "may be detained beyond the removal period"

– does not suggest the length of the additional authorized detention, additional language must be read into the statute. Should that language be "as long as the Government sees fit" (as the Government argued in *Zadvydas*), "as long as would be constitutional depending on the specific kind of alien being detained" (as the Government argues now), or "as long as necessary to determine whether removal is reasonably foreseeable" (as Mr. Benitez argues)?

In *Zadvydas*, this Court selected the latter interpretation. The Eleventh Circuit should have followed this Court's dictate. The meaning of these same words should not and cannot change depending on the pedigree of the alien to whom they are applied. The Eleventh Circuit's justifications for rejecting *Zadvydas* when considering the detention of paroled aliens do not withstand scrutiny.

A. This Court's interpretation of § 1231(a)(6) in *Zadvydas* should be the final word.

The Eleventh Circuit failed to appreciate the nature of both the holding and the reasoning in *Zadvydas*.

1. In *Zadvydas*, this Court held that the language "may be detained beyond the removal period" authorizes detention only as long as necessary to determine whether removal is reasonably foreseeable.

Because this Court made clear in *Zadvydas* that the constitutionality of the indefinite detention of a parolee would "present a very different question," the Eleventh Circuit distinguished *Zadvydas* and selected an entirely different interpretation of § 1231(a)(6). In so doing, it simply misunderstood the holding in *Zadvydas*. The holding was a matter of statutory construction, not constitutional law.

Even if the "serious constitutional threat" that led this Court to interpret § 1231(a)(6) is not present in cases involving paroled aliens, the fact remains that this Court has given its interpretation of this statute. Lower courts may not interpret the statute differently. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."); *Elmendorf v. Taylor*, 23 U.S. (10 Wheat) 152, 160 (1825) ("[T]he construction given by this Court to the constitution and laws of the United States is received by all as the true construction. . . .").

Although this Court indicated that the *constitutional analysis* would be "a very different question" in a case involving aliens who "have not yet gained admission to this country," *Zadvydas*, 533 U.S. at 682, nowhere in the opinion did the Court suggest that the statutory analysis would be different or that its ultimate interpretation of § 1231(a)(6) would not apply to those aliens. To the contrary, in contrast to the constitutional analysis, the Court's entire discussion on statutory interpretation (Part III(B) of the opinion) referred to aliens generally, not just to aliens who have effected an entry. *See id.* at 696-99; *see also Lin Guo Xi*, 298 F.3d at 836 ("Concluding that the statute 'does not permit indefinite detention,' the Court pointedly used the term 'aliens' as opposed to 'deportable aliens.' ").

The Court was clearly aware that the language it was interpreting also applied to aliens who had not effected an entry. The Court noted that § 1231(a)(6) "applies to certain categories of aliens who have been ordered removed, namely *inadmissible* aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons." *Zadvydas*, 533 U.S. at 688 (emphasis

added); *see also Lin Guo Xi v. INS*, 298 F.3d 832, 835-36 (9th Cir. 2002) (emphasizing this language).

Moreover, Justice Kennedy's dissent (in which Chief Justice Rehnquist joined) emphasized both the fact that the statute applied to inadmissible aliens and the clear indication that the majority was interpreting the statute in general, not just as applied to admitted aliens:

> Congress provides for detention of both categories within the same statutory grant of authority. Accepting the majority's interpretation, then, there are two possibilities, neither of which is sustainable. On the one hand, it may be that the majority's rule applies to both categories of aliens. . . . On the other hand, the majority's logic might be that inadmissible and removable aliens can be treated differently. *Yet it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility.*

Zadvydas, 533 U.S. at 710 (Kennedy, J., dissenting) (emphasis added). More to the point, Justice Kennedy expressly noted that the release of Mariel Cuban parolees like Mr. Benitez "would seem a necessary consequence of the majority's construction of the statute." *Id.* at 717. All four dissenting justices joined this portion of Justice Kennedy's dissent, and the majority did not dispute Justice Kennedy's point. *See id.* at 702 (Scalia, J., dissenting, joined by Thomas, J.) (joining Part I of Justice Kennedy's dissent). Thus, while the Court was closely split as to the length of detention authorized by § 1231(a)(6), there appears to have been no disagreement that once interpreted, the same interpretation should apply to all who are covered by the statute.

2. This Court's interpretation of § 1231(a)(6) in *Zadvydas* was the result of thorough interpretive analysis.

In addition to misapprehending the holding in *Zadvydas*, the Eleventh Circuit also failed to appreciate this Court's underlying reasoning. In rejecting this Court's interpretation of § 1231(a)(6) with regard to paroled aliens, the Eleventh Circuit overlooked this Court's invocation of various interpretative aids aside from the avoidance doctrine. While the avoidance doctrine may have been the final consideration that led this Court to interpret § 1231(a)(6) as it did, the Court conducted a thorough and searching interpretative analysis that supported its construction.

Starting as always with the plain language of the statute, the Court rejected the Government's argument that the statute's use of the term "may" put the length of detention in the unfettered discretion of the Attorney General:

> The Government points to the statute's word "may." But while "may" suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word "may" is ambiguous.

Zadvydas, 533 U.S. at 697. Thus, the Court held that it could not determine the length of detention authorized based on the language of the statute alone. *Id.* at 696-97.

The Court then examined the purpose of § 1231 itself – "effectuating an alien's removal." *Id.* at 697; *see also United States v. Witkovich*, 353 U.S. 194, 202 (1957) (holding that clause in immigration statute regarding supervision of aliens subject to deportation order "must be placed in the context" of the "legislative scheme designed to govern and to expedite the deportation of undesirable aliens"). Because this purpose is no longer served when it becomes clear that the alien cannot be removed, the Court invoked the long-held legal principle "*Cessante ratione legis cessat ipse lex*,"

which means "the rationale of a legal rule no longer being applicable, that rule itself no longer applies." *Zadvydas*, 533 U.S. at 699 (quoting 1 E. Coke, *Institutes* 70b).

The Court also noted that in three other detention provisions, Congress spoke in "clearer terms." *Id.* at 697. First, while § 1231(a)(6) makes no mention of the possibility that removal may never be possible, 8 U.S.C. § 1537(b)(2)(C) (1994 ed. Supp. V) specifically authorized continued detention of a terrorist alien "if no country is willing to receive" the alien. *Zadvydas*, 533 U.S. at 697. Lest there be any doubt that this provision contemplates continuing detention, it provides for review of the detention determination every six months. *Id.*

Second, while § 1231(a)(6) provides that the Attorney General "may" detain an alien beyond the removal period, 8 U.S.C. § 1226(c) affirmatively provides that the Attorney General "shall" detain certain criminal aliens during the removal proceedings and "may" release such an alien only under certain conditions. *Zadvydas*, 533 U.S. at 697.

Third, 8 U.S.C. § 1231(a)(2) mandates that "under no circumstances" shall the Attorney General release certain criminal or terrorist aliens during the ninety-day removal period. Section 1231(a)(6), of course, does not have similar language; indeed, it places no limitation on the circumstances under which the Government may release the broad ranges of aliens covered by the provision. *Zadvydas*, 533 U.S. at 697.

This Court further contrasted these provisions with § 1231(a)(6) to demonstrate why indefinite detention under those provisions would be less suspect than under § 1231(a)(6). The Court first noted that "post-removal-period detention, unlike detention pending a determination of removability [under § 1226(c)] or during the subsequent 90-day removal period [under § 1231(a)(2)], has no obvious

termination point." *Zadvydas*, 533 U.S. at 697.[7] Second and "[m]ore importantly," the Court noted that unlike the other statutes, § 1231(a)(6) "applies not only to terrorists and criminals, but also to ordinary visa violators." *Zadvydas*, 533 U.S. at 697. Thus, a comparison of both the purposes and the text of these three provisions with § 1231(a)(6) further supported this Court's interpretation.

The Court then reviewed the history of § 1231(a)(6) and predecessor statutes governing post-removal detention, *id.* at 698, and "found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention." *Id.* at 699. Indeed, consistent with the Court's interpretation of § 1231(a)(6) in *Zadvydas*, the earlier statutes and cases generally limited post-removal detention to six months or "a reasonable time." *Id.* at 698.

Finally, in selecting which of the competing interpretations to adopt, the Court chose the more narrow interpretation to "avoid a serious constitutional threat." *Id.* at 699. While much of the opinion was devoted to analyzing the seriousness of this threat, the Court's thorough consideration of the other interpretative factors – language, statutory purposes, comparative analysis, and statutory history – was equally critical to the Court's ultimate interpretation.

After all, this Court has repeatedly emphasized that the avoidance doctrine is applicable only when there is more than one permissible interpretation. *See, e.g., United*

[7] Indeed, this Court has subsequently upheld the constitutionality of § 1226(c), even as applied to aliens who have been formally admitted, in large part because "while the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,' the detention here is of a much shorter duration." *Demore v. Hyung Joon Kim*, 538 U.S. 510, __, 123 S. Ct. 1708, 1720 (2003).

States v. Salinas, 522 U.S. 52, 60 (1997) (holding that constitutional avoidance doctrine cannot be invoked where statute is "unambiguous"); *Jean v. Nelson*, 472 U.S. 846, 854 (1985) ("Of course, the fact that courts should not decide constitutional issues unnecessarily does not permit a court to press statutory construction 'to the point of disingenuous evasion' to avoid a constitutional question."). While the dissent in *Zadvydas* contended that the Court's interpretation was "not plausible," *Zadvydas*, 533 U.S. at 707, that view simply did not carry the day.

For all these reasons, the Eleventh Circuit erred in substituting its own interpretation of § 1231(a)(6) for that of this Court.[8]

B. The meaning of statutory language should not change depending on the person to whom it is applied.

Even if *Zadvydas* did not directly establish the proper interpretation of § 1231(a)(6) as applied to all aliens, Justice Kennedy was entirely correct in noting that "it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of

[8] Even if a minority of this Court continues to disagree with the interpretation reached in *Zadvydas*, principles of *stare decisis* should lead that minority to agree that the Eleventh Circuit's ruling must be reversed. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 209-10 (1994) (Scalia, J., concurring); *Orozco v. Texas*, 394 U.S. 324, 327-28 (1969) (Harlan, J., concurring).

Indeed, because Congress can always enact a statute explicitly authorizing indefinite detention (at which point the constitutional question will be called), the principles of *stare decisis* have particularly strong application in this case. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

this possibility." *Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting). The language of the statute does not in any way distinguish in its application between paroled aliens and other aliens present in the United States. To the contrary, "[t]he statute itself clearly indicates, on its face, that it is equally applicable to both inadmissible/excludable aliens and to otherwise removable aliens." *Borrero v. Aljets*, 178 F. Supp. 2d 1034, 1041 (D. Minn. 2001) ("*Borrero I*"), *rev'd*, 325 F.3d 1003 (8th Cir. 2003) ("*Borrero II*").

The failure of this statute to suggest in any way that the length of detention or the authority to detain depends on the nature of the alien's presence in the country is dispositive. As the en banc Sixth Circuit reasoned:

> Section 1231(a)(6) itself does not draw any distinction between the categories of removable aliens; nor would there be any statutory reason to interpret "detained beyond the removal period" differently for aliens who are removable on grounds of inadmissibility and aliens who are removable on grounds of deportability. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) (discussing presumption that a statutory term retains the same meaning throughout a statute and in particular throughout a provision).

Rosales-Garcia v. Holland, 322 F.3d 386, 404-05 (6th Cir.) (en banc), *cert denied*, ___ U.S. ___, 123 S. Ct. 2607 (2003); *accord Lin Guo Xi*, 298 F.3d at 836 ("The statute, on its face, makes no exceptions for inadmissible aliens. The Supreme Court's unqualified holding provides that the statute 'does not permit indefinite detention.'"); *Borrero I*, 178 F. Supp. 2d at 1042 ("[W]e can find no sound reason to interpret and apply the statute one way for one category of aliens, but a different way for others.").

Similarly, this Court has emphasized that "where the Legislature makes a plain provision, without making any

exception, the courts can make none." *French's Lessee v. Spencer*, 62 U.S. (21 How.) 228, 238 (1858), *quoted in Rosales-Garcia*, 322 F.3d at 405 n.25, *and Lin Guo Xi*, 298 F.3d at 836. Because the Legislature did not distinguish between admitted and paroled aliens in § 1231(a)(6), neither should the courts. Indeed, the notion that the same words in the same sentence can mean something very different as applied to different people belies any sense of fairness or justice. *Cf. Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001) (noting that if the meaning of a statute could "change depending on the background or pedigree of the petitioner," then "the meaning of any statute [would be rendered] as changeable as the currents of the sea, and potentially as cruel and capricious").

An exhaustive search of all of this Court's decisions regarding the constitutional avoidance doctrine has yet to reveal a single decision in which this Court suggested that the same words of a statute may be interpreted one way with regard to situations in which a serious constitutional question would be raised, but an entirely different way to situations that do not pose the same constitutional problem. Indeed, aside from the lower courts that have refused to apply this Court's interpretation in *Zadvydas* to paroled aliens, there does not appear to be any such precedent in any American court. *See Lin Guo Xi*, 298 F.3d at 839 ("The government has offered no authority suggesting that a litigant may not take advantage of a statutory interpretation that was guided by the principle of constitutional avoidance when that litigant's case does not present the constitutional problem that prompted the statutory interpretation.").

C. The grounds relied upon by the courts that have interpreted § 1231(a)(6) differently for parolees do not withstand scrutiny.

1. This Court's statements that more deference to Congress and the Executive might be justified in other circumstances had no bearing on the Court's interpretive analysis.

The Eleventh Circuit adopted the Eighth Circuit's reasoning that *Zadvydas* does not apply to paroled aliens because "*Zadvydas* itself does not mandate uniform application of § 1231(a)(6) to all aliens." (J.A. 79 (quoting *Borrero II*, 325 F.3d at 1007).) The two courts reached this conclusion based on this Court's "notation that 'terrorism or other special circumstances' may justify greater deference to Congress and the Executive." (J.A. 79 (quoting *Borrero II*, 325 F.3d at 1007 (in turn quoting *Zadvydas*, 533 U.S. at 696)).) Their reasoning is flawed because they have taken the Court's language out of context.

The referenced passage appears not in the Court's analysis of how the statute can be interpreted, which appears in Part III(B) of the opinion, but in Part III(A), which contains the Court's analysis of whether the indefinite detention of admitted aliens poses a serious constitutional question. *Zadvydas*, 533 U.S. at 695-96. This constitutional analysis presupposed an interpretation of § 1231(a)(6) that authorized indefinite detention. The Court, however, adopted the other plausible interpretation – that the provision only authorizes detention for as long as necessary to determine whether removal is reasonably foreseeable.

Moreover, in making the referenced comment, the Court was addressing the specific question of whether scrutinizing the indefinite detention of aliens ordered removed unduly interferes with the authority of Congress and the Executive over immigration law. *Id.* The Court emphasized that the

scope of its analysis was limited to the context of evaluating "whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States." *Id.* at 695. The Court did so by noting the issues that were not before it. The Court was not, for example, examining "the right of Congress to remove aliens, to subject them to supervision or to incarcerate them where appropriate for violations of those conditions." *Id.* The Court went on to note:

> Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.

Id. at 696. Thus, this reference to heightened deference with regard to "terrorism or other special circumstances" was made to demonstrate that § 1231(a)(6) is *not* directed at such cases. Again, § 1231(a)(6) only deals with the general issue of what to do with "aliens that the Government finds itself unable to remove." *Id.* at 695.

For these reasons, the Court's suggestion that a different level of constitutional analysis would apply if § 1231(a)(6) were limited to terrorists and other special circumstances in no way implies that the statute should be interpreted differently in those situations. At most, the referenced language in *Zadvydas* signals that the Court may be more inclined to tip the scales in favor of the Government if and when it considers the constitutionality of a statute that authorizes indefinite detention of a more narrowly defined group of aliens, like terrorists. *See, e.g.*, 8 U.S.C. § 1537(b)(2)(C) (authorizing continuing detention of terrorist aliens the Government is unable to remove), *cited in Zadvydas*, 533 U.S. at 697.

2. *Zadvydas* was not an "as-applied constitutional challenge."

The Eleventh Circuit further justified its limitation of *Zadvydas* by contending that this Court's opinion "reads like an as-applied constitutional challenge." (J.A. 80.) This observation is simply incorrect.

If this Court had decided in *Zadvydas* that § 1231(a)(6) was unconstitutional as applied to admitted aliens, it would have written a very different opinion. First, instead of concluding that § 1231(a)(6) authorizes detention only for as long as necessary to determine whether removal is reasonably foreseeable, the Court would have begun the opinion with the conclusion that the statute must be interpreted to authorize indefinite detention. Second, the Court never would have invoked the avoidance doctrine. The whole purpose of the doctrine is to allow federal courts to avoid having to review and possibly reject the will of the elected legislature where possible. Finally, the Court would have been forced to do what it chose not to do – answer the serious constitutional question of whether the Constitution permits the indefinite detention of admitted aliens.

Similarly, the Eleventh Circuit suggested that this Court radically altered the established meaning of § 1231(a)(6). The court stated, for example, that in *Zadvydas*, this Court "left the law, and it seems to us the statutory scheme too, intact with respect to inadmissible aliens who never have been admitted into the United States." (J.A. 80; *see also* J.A. 80-81 (characterizing *Zadvydas* as "a nuanced interpretation of § 1231(a)(6) that keeps it from being applied unconstitutionally *but otherwise leaves it alone*." (emphasis added)) (quoting *Lin Guo Xi*, 298 F.3d at 841 (Rymer, J., dissenting).)

Nowhere in its opinion, however, did this Court state, much less suggest, that it was altering the meaning of the statute. The Court recognized that the statute could be interpreted to authorize indefinite detention, but could also be interpreted to authorize detention only for as long as necessary to determine whether removal is reasonably foreseeable. *Zadvydas*, 533 U.S. at 689, 697. Of these two permissible interpretations, the Court picked the latter. In short, the holding in *Zadvydas* was a matter of statutory interpretation, not constitutional law.

3. Mr. Benitez does not argue that § 1231(a)(6) gives him any right to parole, only that it does not authorize the permanent deprivation of his general right to be free from detention.

Finally, the last ground on which the Eleventh Circuit limited *Zadvydas* was its conclusion that "reading § 1231(a)(6) as creating a right to parole into this country after six months for inadmissible aliens is undoubtedly a drastic expansion of the rights of inadmissible aliens." (J.A. 82.) The court relied on a provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") – the act creating current § 1231(a)(6) – that provides that the act should not be construed to "create any substantive or procedural right or benefit that is legally enforceable." (J.A. 82 (citing 8 U.S.C. § 1231(h)).)

As this Court made clear in *Zadvydas*, however, the issue is not whether the statute creates a right, it is whether the statute authorizes the Government to extinguish a basic human liberty:

> The question before us is not one of "confer[ring] on those admitted the right to remain against the national will" or "sufferance of aliens" who

> should be removed. Rather, the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.

Zadvydas, 533 U.S. at 695. Mr. Benitez is not trying to enforce a right created under § 1231(a)(6); he is simply asking the Court to determine whether the statute authorizes his continued detention.

As this Court noted in *Zadvydas*, the stringent conditions of the release Mr. Benitez seeks and the criminal penalties applicable for violating those conditions further belie any notion that Mr. Benitez seeks the rights of an alien admitted for permanent residence. *See id.* at 695 ("[W]e nowhere dery the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions."); 8 U.S.C. § 1231(a)(3) (2001) (granting authority to promulgate regulations governing supervision and conditions of release of aliens not removed within 90 days); 8 U.S.C. § 1253(b) (2001) (imposing criminal penalties for failure to comply with release conditions); Conditions of Release After Removal Period, 8 C.F.R. § 241.5 (2003) (requiring alien to periodically report to immigration officer and answer questions under oath, continue to try to obtain travel documents to effectuate removal, report for physical or mental evaluations as directed, obtain advance permission for any significant travel, and update immigration officer with current address).

For all these reasons, this Court's decision in *Zadvydas* answered the question posed in this case. Section 1231(a)(6) does not authorize indefinite detention, regardless of whether indefinite detention of an alien in Mr. Benitez's circumstances would raise a serious constitutional question.

II. INTERPRETING § 1231(A)(6) TO AUTHORIZE THE INDEFINITE DETENTION OF A PAROLED ALIEN WOULD RAISE A SUFFICIENTLY SIGNIFICANT CONSTITUTIONAL QUESTION TO WARRANT INTERPRETING THE STATUTE TO AVOID THE QUESTION.

Alternatively, even if this Court were to determine that the same language in § 1231(a)(6) could mean something different for Mr. Benitez than for Mr. Zadvydas, the same interpretation should still apply. If *Zadvydas* means anything, it is that if indefinite detention of a class of aliens raises a serious constitutional question, then § 1231(a)(6) should be interpreted to authorize detention for only as long as removal is reasonably foreseeable. This holding should apply here because the indefinite detention of a paroled alien like Mr. Benitez would also raise a serious constitutional question.

A. The Fifth Amendment's Due Process Clause applies to the detention of paroled aliens.

The starting point of the constitutional analysis is the Due Process Clause of the Fifth Amendment, which provides, in relevant part, "No person shall be . . . deprived of . . . liberty . . . without due process of law." The threshold question is whether Mr. Benitez is a "person" for purposes of the Due Process Clause. This Court has already made clear in *Zadvydas* that indefinite detention pursuant to § 1231(a)(6) implicates the "liberty" interest protected by the clause. *See Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects.").

This Court has long made clear that any alien physically present in this country, even if his or her presence is

illegal, is protected by the Due Process Clause, which by its plain language applies to "all persons."

> [O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

Id. at 693 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982), *Mathews v. Diaz*, 426 U.S. 67, 77 (1976), *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953), and *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). Indeed, this Court has specifically held that Cuban aliens paroled pursuant to § 1182(d)(5) are entitled to constitutional protection. *Mathews*, 426 U.S. at 77. Mr. Benitez therefore generally enjoys the protections of the Due Process Clause.

The question thus becomes whether there is something about Mr. Benitez's continued detention in this case that removes this general protection.

1. The "entry fiction" has no application to Mr. Benitez's detention.

The Eleventh Circuit held that Mr. Benitez has no due process right with regard to indefinite detention because he is in this country on immigration parole. (J.A. 75-77.) Pursuant to the "entry fiction," an alien who is allowed to land on our shores while his application for admission is pending is treated for immigration purposes as if he were stopped at the border. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953). The Eleventh Circuit relied on this Court's observation in *Zadvydas* that, in light of the entry fiction, the constitutionality of detaining aliens who "have not yet gained initial admission to this country would present a very different question" from the constitutionality of detaining admitted aliens. *Zadvydas*,

533 U.S. at 682. Although the question may be different, the answer is the same for at least four different reasons.

First, the entry fiction does not limit the constitutional rights of aliens who have been paroled into the country. Specifically, the fiction is largely a statutory concept, as opposed to a rule of constitutional law. It derives from specific statutes that provide that instead of being forced to remain on board the boat in which he arrived pending the review of his application for admittance, an applicant may temporarily land on our shores:

> Aliens seeking entry from contiguous lands obviously can be turned back at the border without more. While the Government might keep entrants by sea aboard the vessel pending determination of their admissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course. By statute it authorized, in cases such as this, aliens' temporary removal from ship to shore. But such temporary harborage, an act of legislative grace, bestows no additional rights. Congress meticulously specified that such shelter ashore 'shall not be considered a landing' nor relieve the vessel of the duty to transport back the alien if ultimately excluded. And this Court has long considered such temporary arrangements as not affecting an alien's status; he is treated as if stopped at the border.

Mezei, 345 U.S. at 215 (citations and footnote omitted).

This "legislative grace" has been extended to allow the temporary parole of the alien into the population while his application is being processed. *See* 8 U.S.C. § 1182(d)(5). As with the statutory scheme allowing a temporary landing described in *Mezei*, § 1182(d)(5) specifically provides that a paroled alien is not to be treated as having been admitted. Even though he is in reality present in the

United States, the immigration statutes treat him as if he were not. Hence, the concept truly is a "fiction."

While this Court has endorsed this fiction in determining that an alien on parole does not enjoy certain *statutory* rights accorded to admitted aliens, *see Leng May Ma*, 357 U.S. at 188; *Kaplan*, 267 U.S. at 230-31, it has never held that they do not enjoy the *constitutional* protections of "persons" within our territory. *See Jean*, 472 U.S. at 869 (Marshall, J., dissenting) (arguing that extension of entry fiction to deprive aliens present in the United States of constitutional protections "can withstand neither the weight of logic nor that of principle, and has never been incorporated into the fabric of our constitutional jurisprudence"); *see also* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact Of Zadvydas v. Davis*, 16 Geo. Immigr. L.J. 365, 378 (2002) ("The only possible basis for putting parolees into the 'initial entrant/*Mezei*' category is because Congress – at one time – made 'entry' a gatekeeping concept and determined that parole shall not constitute an 'entry.' To hold now that parolees are not within the protection of the ruling in *Zadvydas* would be to permit statutory policies to dictate constitutional results.").

Thus, for example, in *Mathews*, this Court held that Cuban citizens paroled into the country under 8 U.S.C. § 1182(d)(5) are not "lawfully admitted for permanent residence" for purposes of a Medicare statute, 425 U.S. at 74 n.7, but are still "persons" protected by the Due Process Clause. *Id.* at 77. In determining after considerable constitutional analysis that the regulation in that case did not violate the aliens' due process rights, the Court clearly was not of the opinion that the entry fiction deprived paroled aliens of those rights. *Id.* at 77-88.

Moreover, it would be perverse if an alien who properly reported to an immigration checkpoint to apply for

admission to this country was not protected by the Due Process Clause while legally paroled into the country, but another alien who snuck through the border without inspection did receive this protection. This Court has made clear, however, that even illegal aliens are in fact protected by the Due Process Clause. *Zadvydas*, 533 U.S. at 693 (citing *Plyler*, 457 U.S. at 210, *Mathews*, 426 U.S. at 77, *Kwong Hai Chew*, 344 U.S. at 596-98, and *Yick Wo*, 118 U.S. at 369). And the Government has clearly (and correctly) read *Zadvydas*'s limiting interpretation on § 1231(a)(6) to apply to illegal aliens who entered without inspection. 8 C.F.R. § 241.13(3)(i) (2003); 66 Fed. Reg. at 56,969. Thus, the entry fiction should not be applied to evaluate the constitutional rights of paroled aliens.

A second reason why the fiction should not apply here is that to the extent the fiction is a valid constitutional concept, it should be limited to admission and removal decisions. It should not apply to the treatment of aliens paroled into the country. Because of the nature of sovereignty, the entry fiction may make some sense, even in constitutional terms, with regard to proceedings to determine whether an alien may be lawfully admitted into the country or forcibly removed. Thus, for example, this Court has suggested that an arriving alien who is allowed to disembark from a ship and come onto dry land at the port has few if any constitutional rights with regard to his application for admission. *See Mezei*, 345 U.S. at 213, 215; *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *Nishimura Ekiu v. United States*, 142 U.S. 651, 661-62 (1892). It may even be assumed, for the sake of argument, that a paroled alien may face a real obstacle in challenging the Government's decision to deny him admission or to remove him.

Mr. Benitez, however, does not challenge the authority of the Government to deny him initial passage into the country or to deny his application to adjust his status to

that of a lawful permanent resident. He only challenges his treatment now that he has been allowed into the country (and to stay here for more than twenty years). Nor does he challenge the right of the Government to send him back to Cuba. He challenges only the way the Government treats him until it does so.

Indeed, this Court has long held that the Fifth Amendment governs the treatment of an alien awaiting his removal. *See Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896). In that case, this Court struck down a federal law providing for imprisonment at hard labor while Chinese aliens awaited deportation. In reasoning directly applicable to this case, the Court stated:

> No limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein. *But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.* It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents.

Id. at 237 (emphasis added). Section 1231(a)(6), of course, does not provide for a judicial trial before the deprivation of an alien's liberty.

Third, unlike most other paroled aliens, Mariel Cubans like Mr. Benitez came here at the invitation and encouragement of the United States. Even if the entry

fiction might rationally subject other paroled aliens to an indefinite deprivation of liberty, it would be cruel and capricious to apply the doctrine to Mariel Cubans like Mr. Benitez. These people are essentially refugees whom the United States, through President Carter, invited with "open heart and open arms" to come to our country.

Fourth and finally, the parole of Mariel Cubans was not a temporary solution while their admissibility was determined. The genesis of the entry fiction was the practical and humanitarian need to allow arriving aliens to disembark from their vessel and, in limited situations, to join the population while immigration officials determined whether they are admissible. *Mezei*, 345 U.S. at 215. The decision to parole the Mariel Cubans, however, did not contemplate a temporary release while immigration officials determined admissibility. The Government cannot credibly contend that it needs over twenty years to determine whether Mariel Cubans are admissible.

At least in the case of the Mariel Cubans, parole was used to allow aliens who were technically inadmissible to enter the United States anyway. Nearly all of the Mariel Cubans were inadmissible (or "excludable" in pre-IIRIRA parlance) because they did not obtain visas. *See* 8 U.S.C. § 1182(a)(7)(A)(i)(I). Moreover, despite the Mariel Cubans' inadmissible/excludable status, after being physically present for at least one year, they were allowed to apply to adjust their status to lawful permanent residents if they were eligible to receive an immigrant visa and were otherwise admissible for permanent residence. Pub. L. No. 89-732, 80 Stat. 1161; Pub. L. No. 96-212 at § 203(i), 94 Stat. at 108. (codified as amended at 8 U.S.C. § 1255, historical and statutory notes). Thus, in no way was the parole of Mariel Cubans intended to be a temporary solution while the Government reviewed their applications for admission. Indeed, in

Mr. Benitez's case, he was fully eligible for adjustment until his 1983 conviction for purchasing stolen speakers.

In short, the justification for the entry doctrine is not present in the case of the Mariels. The same legal principle on which this Court relied in *Zadvydas* should apply here to establish the inapplicability of the entry fiction: "'*Cessante ratione legis cessat ipse lex*' (the rationale of a legal rule no longer being applicable, that rule itself no longer applies)." *Zadvydas*, 533 U.S. at 699 (quoting 1 E. Coke, *Institutes* 70b).

2. *Mezei* does not control in this case.

The Eleventh Circuit relied entirely on this Court's Cold War decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which upheld a constitutional challenge to the indefinite detention of an arriving alien. Mr. Benitez's circumstances, however, differ in at least four material respects.

First, unlike Mr. Mezei, Mr. Benitez lived continuously in the United States prior to his detention. While Mr. Mezei had lived in the United States for several years, he had been absent behind the Iron Curtain for nineteen months before his attempted re-entry at Ellis Island. *Id.* at 208. The Court held that this significant break in time was controlling and that Mr. Mezei had been "assimilated" to the status of an arriving alien. *Id.* at 214. The Court contrasted Mr. Mezei with the petitioner in another case that year who had only been absent for four months with permission from the Government. *Id.* (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953)). In *Kwong Hai Chew*, the Court held that the alien retained the constitutional protections of a person in the United States. 344 U.S. at 601. Because Mr. Benitez has remained continuously in the United States since 1980, he has more constitutional protection than did Mr. Mezei.

Second, unlike Mr. Mezei, Mr. Benitez was not detained at the border. Mr. Mezei arrived at the entry port on Ellis Island and, although he was allowed to get off the boat, he was not allowed to enter any further into the United States. *Mezei*, 345 U.S. at 208-09. Mr. Benitez, on the other hand, spent a single night at a refugee camp in Key West before he was driven to Miami and promptly picked up by his aunt and uncle as a free man. As Professor Aleinikoff has observed:

> Whatever logic might distinguish the case of noncitizens who have proceeded no further into the United States than an inspection post at the border from those who have been admitted, it is hard to see how a parolee who has lived freely in the United States for years would not come within the category of persons that the Court says the due process clause of the Constitution protects.

Aleinikoff, *supra*, 16 Geo. Immigr. L.J. at 378.

Third, unlike Mr. Mezei, Mr. Benitez has not been found to pose any risk to national security. The key fact in *Mezei* was that the Government had determined that Mr. Mezei's release into the United States "would be prejudicial to the public interest for security reasons." *Mezei*, 345 U.S. at 208. This determination was "made on the 'basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.'" *Id.* The Court noted that Mr. Mezei had just returned from nearly two years "behind the Iron Curtain" and the case arose at the height of the Cold War. *Id.* at 214. Indeed, the Court emphasized the President's additional authority in immigration matters "during periods of international tension

and strife," which included "the present emergency." *Id.* at 210.

Finally, to the extent *Mezei* stands for the proposition that a paroled alien has no right to be free from unjustified detention, it is inconsistent with this Court's subsequent civil detention cases and should be overruled or limited to its facts. As explained in detail in Part II of the *amicus curiae* brief of the American Bar Association, this Court's view and interpretation of the Due Process Clause – both its substantive and procedural components – have undergone substantial development and clarification since *Mezei* was decided.

B. The indefinite detention of paroled aliens like Mr. Benitez violates their right to substantive due process.

In *Zadvydas* this Court engaged in the full due process analysis of the indefinite detention of an admitted alien. 533 U.S. at 690-96. Accordingly, Mr. Benitez will limit his argument here to a few additional points that further support this analysis.

1. The governmental objectives sought to be accomplished by § 1231(a)(6) do not support indefinite detention.

As this Court found in *Zadvydas*, flight risk and danger to the community are insufficient to support indefinite detention under § 1231(a)(6). *Id.* at 690-92. Inadmissible paroled aliens present no greater risks of flight or danger than do the aliens considered in *Zadvydas*. Indeed, a review of the reasons that a particular alien might be inadmissible demonstrates that there is no rational basis for tying alien status to either of these risks.

Among the grounds that would render an alien inadmissible, and thus subject to detention under § 1231(a)(6), are: (1) being sufficiently poor as to be "likely at any time to become a public charge," 8 U.S.C. § 1182(a)(4)(A); (2) seeking to "perform[] skilled or unskilled labor" unless a specific need is certified by the Secretary of Labor, § 1182(a)(5)(A)(i); (3) having an expired visa or passport, § 1182(a)(7)(A), (B); (4) having left or remained out of the United States to avoid the draft, § 1182(a)(8)(B); (5) being a practicing polygamist, § 1182(a)(10)(A); (6) being "helpless from sickness, mental or physical disability or infancy" or accompanying such a person, § 1182(a)(10)(B); (7) having voted illegally in the United States, § 1182(a)(10)(D); or (8) having previously renounced United States citizenship to avoid paying taxes, § 1182(a)(10)(E). This is hardly a murderer's row of aliens who would be likely to flee or present a danger to the community.

The facts of this case demonstrate beyond doubt that § 1231(a)(6) is not tied to the policy goals that indefinite detention would serve. On the only two occasions that the Cuban Review Panel has considered Mr. Benitez's detention, it determined that he was eligible for release. This necessarily means that the panel concluded that Mr. Benitez is presently non-violent, is likely to remain non-violent, and is not otherwise likely to violate any conditions of his supervised release. *See* 8 C.F.R. § 212.12(d)(2) (requiring these findings before the panel may recommend that a parolee be released). In other words, Mr. Benitez is still being detained despite affirmative findings by the Government that neither policy underlying his detention is present. Thus, indefinite detention under § 1231(a)(6) would fail even the most minimal level of constitutional scrutiny.

2. Section 1231(a)(6) does not provide adequate procedural safeguards to support indefinite detention.

In determining that indefinite detention would raise a constitutional problem, this Court also focused on the scant procedural protections provided. "[T]he sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous, without (in the Government's view) significant judicial review." *Zadvydas*, 533 U.S. at 692. Additional procedural deficiencies include the lack of a neutral decision maker. *See* 8 C.F.R. § 212.12(b)(1) (Mariel detainees); 8 C.F.R. § 241.4(d)(1) (non-Mariel detainees). The facts in this case demonstrate an even more insidious problem with the procedures provided: they are illusory. The fact that the Cuban Review Panel has consistently determined Mr. Benitez to be releasable demonstrates that the administrative procedures are no process at all. After nearly three years, he remains in detention.

3. The right of paroled aliens like Mr. Benitez to be free from unjustified, indefinite detention does not leave our nation defenseless against hostile nations attempting to force dangerous foreign nationals on our shores.

Inhumane treatment of human beings is neither the proper nor the only method of protecting our nation. If a rogue nation attempts an assault on our sovereignty by sending its most violent prisoners to our shores, we have many options. Our government can deal with this situation like it would any other infringement on our sovereignty: diplomatically through negotiations, trade sanctions, and the like, or militarily through force.

Moreover, Mr. Benitez does not contend that the United States lacks the power to deny entry to an arriving alien. This would be an entirely different case if the United States had determined that the Mariel Cubans were a threat to our sovereignty and detained them immediately upon their arrival. While indefinite detention might not be the most humane thing to do, it could more logically be defended as necessary to protect our sovereignty. That argument falls apart with the Mariels, however, because the Carter Administration made the political judgment that any risks to our sovereignty were outweighed by our moral obligation to welcome these refugees with an open heart and open arms. The resulting inconvenience of our inability to remove the very small percentage of these refugees whom we no longer want is the price of that political judgment. More importantly, the small minority of Mariel Cubans who had serious mental problems or violent criminal records *were* detained from the outset. *Fernandez-Roque*, 622 F. Supp. at 893 & 895 n.11; Antón & Hernández, *supra*, at 205.

Finally, § 1231(a)(6) is not tailored in any fashion to serve the purpose of protecting our sovereignty. As noted *supra*, it applies broadly to many aliens posing no risks to our citizens, much less to the nation's sovereignty. If Congress believes it appropriate, it can always enact a statute authorizing the indefinite post-removal detention in special circumstances where, for example, a hostile nation has attacked us by dumping its violent criminals on our shores.

C. The indefinite detention of paroled aliens like Mr. Benitez violates their right to procedural due process.

Even if the indefinite detention of a paroled alien did not violate substantive due process, it is now apparent that Mr. Benitez has been denied procedural due process.

As noted *supra*, the procedures put in place by the Cuban Review Panel have established that there is no justification for his continued detention and that he has been eligible for release for more than two years. His continued detention demonstrates that these procedures are illusory.

The events demonstrating this denial of procedural due process occurred largely after Mr. Benitez filed his initial petition. Moreover, he did not have the benefit of legal representation in developing the record below. Therefore, to the extent it is not clear from the record that he has been denied procedural due process, Mr. Benitez asks for a remand to develop the record on this issue.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment of the United States Court of Appeals for the Eleventh Circuit and remand with instructions that the Eleventh Circuit vacate the district court's judgment and direct the district court to grant Mr. Benitez's habeas petition.

Respectfully submitted,

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DANIEL BENITEZ, PETITIONER

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the continued detention of a criminal alien, who was apprehended at the border of the United States, was denied admission, and was subsequently ordered removed from the United States based on his criminal activities, is lawful, when effectuation of the removal order is not immediately foreseeable.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
1. Statutory framework	2
2. Factual background	6
3. Procedural history	11
Summary of argument	12
Argument:	
Section 1231(a)(6) of Title 8 permits the continued exclusion, through detention beyond the statutory removal period, of criminal aliens who have not been admitted to the United States and who cannot be immediately removed	14
A. Aliens stopped at the border and denied admission lack any protected liberty interest in release into the United States	15
1. The Executive and Legislative Branches have comprehensive control over immigration	15
2. The Executive and Legislative Branches have plenary control over aliens at the border	16
3. Parole does not enhance an excluded alien's rights	20
B. The text, structure, and history of Section 1231(a)(6) confirm the Executive Branch's authority to detain excluded criminal aliens	24
1. The statutory text and structure support the Secretary's detention authority	24
2. The legislative history supports the Secretary's detention authority	30
3. The six-month cap inferred in *Zadvydas* does not apply to excluded aliens	32

Table of Contents—Continued: Page

a. Preserving the Secretary's detention authority serves important purposes 33
b. Extending *Zadvydas* to excluded aliens would create, not avoid, constitutional problems 36
C. The existing parole scheme adequately protects the interests of excluded aliens pending their removal 43
Conclusion 50
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 37, 38
Amanullah v. *Nelson*, 811 F.2d 1 (1st Cir. 1987) 26
Barrera-Echavarria v. *Rison*, 44 F.3d 1441 (9th Cir.), cert. denied, 516 U.S. 976 (1995) 26, 31-32
Barrera, In re, 19 I. & N. Dec. 837 (BIA 1989) 8
Bridges v. *Wixon*, 326 U.S. 135 (1945) 18
Carey v. *Piphus*, 435 U.S. 247 (1978) 43
Carlson v. *Landon*, 342 U.S. 524 (1952) 48
Chae Chan Ping v. *United States*, 130 U.S. 581 (1889) 15, 16, 23
Chin Yow v. *United States*, 208 U.S. 8 (1908) 20
Crowell v. *Benson*, 285 U.S. 22 (1932) 29
Demore v. *Kim*, 538 U.S. 510 (2003) 4, 15, 30, 45
Ekiu v. *United States*, 142 U.S. 651 (1892) 16, 19, 20, 21
Fernandez-Roque v. *Smith*:
622 F. Supp. 887 (N.D. Ga. 1985) 7
734 F.2d 576 (11th Cir. 1984) 6, 7, 41
Fiallo v. *Bell*, 430 U.S. 787 (1977) 15, 19
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893) 15

Cases—Continued: Page

Foucha v. *Louisiana*, 504 U.S. 71 (1992) 35, 45
Gisbert v. *Attorney General*, 988 F.2d 1437 (5th Cir), as amended, 997 F.2d 1122 (1993) 7, 8, 36, 41
Greenholtz v. *Inmates of the Nebraska Penal & Corr. Facility*, 442 U.S. 1 (1979) 44, 45, 48
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 15, 24
Heller v. *Doe*, 509 U.S. 312 (1993) 46
INS v. *Abudu*, 485 U.S. 94 (1988) 15
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 15, 41
Jackson v. *Indiana*, 406 U.S. 715 (1972) 33
Jean v. *Nelson*, 727 F.2d 957 (11th Cir. 1984), aff'd, 472 U.S. 846 (1985) 11, 22
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 2
Jones v. *United States*:
526 U.S. 227 (1999) 31
463 U.S. 354 (1983) 46
Kansas v. *Hendricks*, 521 U.S. 346 (1997) 43, 46
Kaplan v. *Tod*, 267 U.S. 228 (1925) 17, 21
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 16, 17, 18
Kwock Jan Fat v. *White*, 253 U.S. 454 (1920) 20
Kwong Hai Chew v. *Colding*, 344 U.S. 590 (1953) 18, 43
Landon v. *Plasencia*, 459 U.S. 21 (1982) 3, 17, 18
Lane v. *Pena*, 518 U.S. 187 (1996) 29
Leng May Ma v. *Barber*, 357 U.S. 185 (1958) 4, 17, 21, 22, 23
Mathews v. *Diaz*, 426 U.S. 67 (1976) 15, 28, 39
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 43, 45
Miller v. *Albright*, 523 U.S. 420 (1998) 28
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 36, 43, 44
Palma v. *Verdeyen*, 676 F.2d 100 (4th Cir. 1982) 6, 7, 32, 40
Plyler v. *Doe*, 457 U.S. 202 (1982) 18, 28
Railroad Retirement Bd. v. *Fritz*, 449 U.S. 166 (1980) 29-30

Cases—Continued: Page

Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 15
Reno v. *Flores*, 507 U.S. 292 (1993) 28, 35
Rogers v. *Quan*, 357 U.S. 193 (1958) 21, 24
Rosales-Garcia v. *Holland*, 322 F.3d 386 (6th Cir.), cert. denied, 123 S. Ct. 2607 (2003) 23
Rust v. *Sullivan*, 500 U.S. 173 (1991) 37
Sale v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) 17, 21, 40, 42, 49
Schall v. *Martin*, 467 U.S. 253 (1984) 35
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) ..... *passim*
Tod v. *Waldman*, 266 U.S. 113 (1924), as modified, 266 U.S. 547 (1925) 20
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 39
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United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 16, 17, 19, 20
United States ex rel. Mezei v. *Shaughnessy*, 195 F.2d 964 (2d Cir. 1952) 19
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Constitution, treaty, statutes and regulations: Page

U.S. Const.:
Art. I:
§ 7, Cl. 2 (Presentment Clause) 37
§ 8 38
Amend. I 18
Amend. V (Due Process Clause) 28, 33, 44, 47, 1a
Immigration Joint Communique Between the United States and Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057 8
Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 38
Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 7
Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)) 3
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 3
§ 303(b)(3)(B)(ii), 110 Stat. 3009-587 31
§ 307(a), 110 Stat. 3009-614 31
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8 U.S.C. 1225(b) (1994) 26
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Statutes and regulations—Continued: Page

8 U.S.C. 1225(b)(1)(B)(iii)(IV) 25
8 U.S.C. 1226 4
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8 U.S.C. 1226(c)(1)(A) 25, 26
8 U.S.C. 1226(e)(1) (1994) 25
8 U.S.C. 1226(e)(3) (1994) 25
8 U.S.C. 1227 (1994) 3
8 U.S.C. 1227(a)(1) (1994) 26
8 U.S.C. 1227(a)(2) (1994) 26
8 U.S.C. 1229a 3
8 U.S.C. 1231 ..... 4, 5, 25
8 U.S.C. 1231(a) 5, 4a
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8 U.S.C. 1253(d) 31
8 U.S.C. 1255a(a)(4) 7
8 U.S.C. 1255 note 7, 24
8 U.S.C. 1522(f)(5) 8, 8a
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 202(a)(3), 100 Stat. 3404 7
22 U.S.C. 6021-6091 40-41
28 U.S.C. 2241 11
8 C.F.R.:
Section 212.5 ..... 5, 9a
Section 212.12 ..... 5, 14a

Regulations—Continued: Page

Section 212.12(b)(1) 45, 14a
Section 212.12(d) 45, 15a
Section 212.12(d)(2) 5, 34, 16a
Section 212.12(d)(4) 6, 45, 17a
Section 212.12(d)(4)(i) 6, 45, 17a
Section 212.12(d)(4)(ii) 6, 17a
Section 212.12(d)(4)(iii) 6, 15, 17a
Section 212.12(f) 6, 18a
Section 212.12(g) 10, 18a
Section 212.12(g)(2) 6, 47, 18a
Section 212.12(g)(3) 6, 47, 19a
Section 212.12(h) 6, 19a
Section 241.4 ..... 5, 20a
Section 241.4(d)(1) 6, 34, 23a
Section 241.4(e) 6, 25a
Section 241.4(f) 45, 25a
Section 241.4(f)(8) 6, 26a
Section 241.4(g)(5) 6, 45, 28a
Section 241.4(h)(1) 6, 45, 29a
Section 241.4(h)(2) 6, 45, 29a
Section 241.4(i)(5) 6, 45, 32a
Section 241.4(j) 6, 33a
Section 241.4(k)(2)(iii) 6, 36a
Section 241.4(k)(2)(v) 47, 36a
Section 241.4(*l*) 6, 38a
Section 241.4(*l*)(3) 47, 39a
Section 241.5 ..... 6, 40a

Miscellaneous:

142 Cong. Rec. 7972 (1996) 30
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H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. (1996) 31
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Legal Immigration: Setting Priorities (1995) 22
U.S. Immigration Policy: Restoring Credibility (1994) 30, 31, 39

In the Supreme Court of the United States

No. 03-7434

DANIEL BENITEZ, PETITIONER

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 337 F.3d 1289. The order of the district court (Pet. App. 27a-31a) and the report and recommendation of the magistrate judge (Pet. App. 32a-37a) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 17, 2003. The petition for a writ of certiorari was filed on October 14, 2003, and was granted on January 16, 2004. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

The issue in this case is whether aliens, who are stopped at the border, denied admission, and subsequently ordered removed based on their commission of crimes within the United States while on immigration parole, may be detained when their country of origin refuses to accept their return.

Such detention is proper because Congress authorized it and a century of constitutional precedent from this Court permits it. Further, a judicially created time limit on detention would interfere significantly with the constitutional responsibility of the political Branches to protect the Nation's borders, manage migration crises, and conduct foreign relations.

1. Statutory Framework

a. Aliens governed by federal immigration law may be grouped into four general categories based on the relative levels of statutory and constitutional protection accorded their interest in residing within the United States. First, aliens who have been lawfully admitted for permanent residence enjoy the greatest statutory and constitutional protection. They generally are entitled to remain in the United States unless they commit certain crimes or engage in other conduct that renders them removable. Second, aliens admitted temporarily as non-immigrants (*e.g.*, students) may remain only for the designated time and purposes of their admission. Third, aliens who have entered illegally and who, therefore, have no statutory claim to remain, nonetheless enjoy some constitutional rights, including a right to due process in any removal proceedings. Fourth, aliens who have been stopped at the border and are seeking admission in the first instance have no constitutional or statutory entitlement to be admitted or released into the United States. See generally *Zadvydas* v. *Davis*, 533 U.S. 678, 693-694 (2001); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien * * * has been accorded a generous and ascending scale of rights as he increases his identity with our society."). This case concerns the rights of the last group—aliens who have been inspected and denied admission into the United States.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, altered the statutory nomenclature used to refer to the different categories of aliens and the procedures for their return or removal. Previously, aliens who were seeking admission into the United States in the first instance, but were ineligible to enter, were denominated "excludable" aliens and were subject to administrative "exclusion" proceedings. See *Landon* v. *Plasencia*, 459 U.S. 21, 25, 28 (1982); 8 U.S.C. 1182, 1252 (1994). Aliens who already had entered the United States, whether legally or illegally, but were ineligible to remain were referred to as "deportable" aliens subject to "deportation" procedures. See 8 U.S.C. 1227, 1251 (1994). Now, under IIRIRA, the term "inadmissible" alien refers both to excludable aliens and those who have entered illegally. 8 U.S.C. 1182(a)(6). The administrative proceeding conducted to determine whether any alien, whether lawfully admitted or inadmissible, can reside within the United States is now denominated a "removal" proceeding. 8 U.S.C. 1229a. For ease of reference, this brief refers to the subcategory of inadmissible aliens who have been refused admission at the border and whose rights are at issue in this case as "excluded" aliens.

b. The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, has long afforded the Attorney General or, since March 1, 2003, the Secretary of Homeland Security (Secretary), the discretion to parole into the United States aliens who have been detained at the border and are seeking admission.[1] Such parole may be granted "temporarily under

[1] On March 1, 2003, the functions of several border and security agencies, including those of the former Immigration and Naturalization Service, were transferred to the Department of Homeland Security and assigned within that Department to Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)).

such conditions as [the Attorney General or, now, the Secretary] may prescribe" and only for "urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 U.S.C. 1182(d)(5) (1976); 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980). The Act makes clear, however, that the discretionary "parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A); see generally *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-190 (1958). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General (or, now, the Secretary), the purposes of the alien's immigration parole have been served, the alien shall be returned to custody, "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. 1182(d)(5)(A).

Congress enacted IIRIRA in 1996 in part to streamline the removal of certain criminal aliens from the United States and to expand the authorization for their detention pending the removal process. To that end, IIRIRA, as amended, requires the Secretary to detain aliens who have committed specified crimes before, during, and for a certain time after a decision regarding their removability. See 8 U.S.C. 1226, 1231; see generally *Demore* v. *Kim*, 538 U.S. 510 (2003). After an order requiring the removal of an alien becomes final, IIRIRA directs the Secretary to remove the alien from the United States within 90 days and to continue detention of criminal aliens during that removal period. 8 U.S.C. 1231(a)(1)(A) and (2). If the Secretary is unable to effect the removal within that 90-day period, IIRIRA provides:

> An alien ordered removed who is inadmissible under section 1182 of this title [*i.e.*, aliens who are statutorily ineligible for admission due, *inter alia*, to the commission of crimes], removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) [*i.e.*, aliens who, subsequent to

> entry, violate their status or conditions of entry, commit specified crimes, or pose a security threat] of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period.

8 U.S.C. 1231(a)(6). When Congress enacted Section 1231 in 1996, it left unamended the longstanding discretionary authority of the Attorney General under Section 1182(d)(5)(A) to parole, to decline to parole, and to revoke the parole, of aliens seeking admission to the United States.

c. While the vast majority of excluded aliens can be removed within or shortly after the 90-day window prescribed by Section 1231(a), the dynamic and fluid nature of foreign relations, as well as political developments in the countries to which aliens are to be removed, sometimes delay removals. In order to minimize the detention of aliens stopped at the border, including those who are subject to a formal order of exclusion or removal but whose removal has been delayed, the Attorney General promulgated regulations (which the Secretary now administers and enforces) governing the release on parole of such aliens. 8 C.F.R. 212.5, 241.4. Those regulations largely mirror the framework developed by the Attorney General in 1987 under his Section 1182(d)(5)(A) parole authority to govern the detention and release of Mariel Cubans (*i.e.*, any Cuban who came to the United States between April 15, 1980, and October 20, 1980). 8 C.F.R. 212.12; see also 52 Fed. Reg. 48,802 (1987).

Under those regulations, an alien may be paroled if he demonstrates that he "(i) is presently a nonviolent person; (ii) * * * is likely to remain nonviolent; (iii) * * * is not likely to pose a threat to the community following his release; and (iv) * * * is not likely to violate the conditions of his parole." 8 C.F.R. 212.12(d)(2); see 8 C.F.R. 212.5, 241.4(d)(1), (e) and (f)(8). The parole determination includes a review of the alien's administrative file, detention record, history of cooperation with removal efforts, and any statement submitted by the alien. 8 C.F.R. 212.12(d)(4), 241.4(g)(5) and (h)(1) (as amended by 67 Fed. Reg. 39,259 (2002)). For Mariel Cubans, parole may not be denied without the alien being personally interviewed. 8 C.F.R. 212.12(d)(4)(ii). For all other aliens, such an interview is discretionary. 8 C.F.R. 241.4(h)(1) (as amended by 67 Fed. Reg. at 39,259). Aliens are provided notice that a parole decision will be made and may be assisted by a person of their choice in preparing submissions. 8 C.F.R. 212.12(d)(4)(ii), 241.4(h)(2) (as amended by 67 Fed. Reg. at 39,259). A written parole decision is issued. 8 C.F.R. 212.12(d)(4)(i) and (iii), 241.4(i)(5). Parole reviews for detained aliens are conducted at least annually, with provision made for interim parole decisions based on changed circumstances. 8 C.F.R. 212.12(g)(2) and (3), 241.4(k)(2)(iii).

If the alien is granted parole, the Secretary may impose conditions and restrictions on the alien. 8 C.F.R. 212.12(f), 241.4(j), 241.5. Parole may be revoked if, among other things, the parolee violates the conditions of parole, repatriation becomes possible, or the purposes of parole have been served. 8 C.F.R. 212.12(h), 241.4(*l*).

2. Factual Background

a. Petitioner is one of approximately 125,000 Cuban nationals, many with criminal records in Cuba, who were stopped and denied admission as they attempted to enter the United States illegally during the 1980 Mariel boatlift. Pet. App. 2a; see *Fernandez-Roque* v. *Smith*, 734 F.2d 576, 578 (11th Cir. 1984); *Palma* v. *Verdeyen*, 676 F.2d 100, 101 (4th Cir. 1982). Because the Mariel Cubans had arrived in ramshackle boats and makeshift rafts, the government concluded that forcing them to remain at sea or to sail in another direc-

tion could have imperiled their lives or physical safety. *Fernandez-Roque* v. *Smith*, 622 F. Supp. 887, 898 (N.D. Ga. 1985).[2] When the government of Cuba refused to accept its nationals back, the Attorney General exercised his discretionary authority to parole most of those Cubans, including petitioner, into the United States. See 8 U.S.C. 1182(d)(5) (1976); 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980); *Gisbert* v. *Attorney General*, 988 F.2d 1437, 1439 (5th Cir.), as amended, 997 F.2d 1122 (1993); *Fernandez-Roque*, 734 F.2d at 579; *Palma*, 676 F.2d at 102.[3]

Federal law permitted Cubans who were paroled into the United States to adjust their status to that of lawful permanent resident after one year. See Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161, as amended (reproduced at 8 U.S.C. 1255 note). However, Cuban aliens who engaged in serious criminal activity were not eligible for adjustment of status. See *ibid.* (applicant must be "admissible to the United States for permanent residence").[4]

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[2] Petitioner's and his amicus's reliance (Pet. Br. 3-4; Fla. Immig. Br. 16-21) on statements made by government officials promising hospitable treatment for the migrants overlooks the accompanying warnings that "exclusion proceedings will also be started against those who have violated American law while waiting to be reprocessed or relocated." See *Fernandez-Roque* v. *Smith*, 622 F. Supp. 887, 894 (N.D. Ga. 1985) (quoting White House statement of June 7, 1980); see also *id.* at 899.

[3] In 1981, when Cuba's refusal to allow repatriation created the possibility of prolonged detention for the small number of Cuban aliens who were not initially paroled because of their criminal backgrounds or serious medical and psychiatric problems, the Attorney General adopted a special Status Review Plan for Mariel Cubans. See generally *Fernandez-Roque*, 734 F.2d at 579. That Plan resulted in the parole of 2040 more Mariel Cubans.

[4] See also 8 U.S.C. 1182(a)(9) (1982); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 202(a)(3), 100 Stat. 3404 (disqualifying Mariel Cubans convicted of serious crimes); 8 U.S.C. 1255a(a)(4); Pet. App. 3a & n.2.

All Mariel Cubans were released on parole at some point after they arrived at the border. The vast majority either remain on parole or have had their status adjusted to that of lawful permanent resident. Approximately 750 Mariel Cubans (including petitioner) are currently in immigration custody, after having their parole revoked, and have been held for more than six months.[5] Since 1987, the Immigration and Naturalization Service (INS), as succeeded by the Department of Homeland Security, has granted parole to Mariel Cubans who were previously in immigration custody approximately 9206 times. Nearly half—approximately 4020—of those paroles were revoked because of subsequent criminal activity in the United States.

b. The United States has consistently maintained that Cuba is required, as a matter of international law, to take back all of its nationals denied admission to the United States. See 8 U.S.C. 1522(f)(5). To that end, the United States has been engaged since the 1980s in ongoing discussions with the Cuban government for the return of excluded Mariel Cubans. In 1984, the United States and Cuba reached an accord on immigration and repatriation that, *inter alia*, called for the return to Cuba of 2746 specified individuals with serious criminal backgrounds or mental infirmities. See Immigration Joint Communique Between the United States and Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057. Since that accord, the process of returning excluded aliens to Cuba has been halting, and discussions with the Cuban government on the full range of migration issues have stopped and restarted a number of times. See 52 Fed. Reg. 48,799 (1987); *Gisbert*, 988 F.2d at 1439 n.4; *In re Barrera*, 19 I. & N. Dec. 837 (BIA 1989). Approximately

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[5] The approximate number of excluded aliens of all nationalities who have been held in custody for more than six months is 1058. Approximately 15,000 aliens are on parole.

1672 Mariel Cubans have been repatriated under that accord, with the most recent repatriations occurring in April 2004.[6]

c. Petitioner arrived in Florida in June 1980, was apprehended at the border, was detained by the INS, and was granted temporary immigration parole into the United States, pursuant to 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980). See J.A. 60. The law authorizing parole provided then (as it does now, see 8 U.S.C. 1182(d)(5)(A)) that "parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5) (1976); 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980).

In June 1983, petitioner was convicted of grand theft for robbing a stereo store and was sentenced to three years' probation. Pet. App. 2a; Certified Admin. Record 52, 55. Petitioner's subsequent application to adjust his status to lawful permanent resident was denied based on that conviction. Pet. App. 3a; see 8 U.S.C. 1182(a)(9) (1982). In April 1993, petitioner pled guilty in Florida state court to committing armed burglary of a structure, armed burglary of a conveyance, two counts of armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed weapon, aggravated battery, and unlawful possession, sale, or delivery of a firearm with an altered or removed serial number. He was sentenced to a 20-year term of imprisonment. Pet. App. 4a; Certified Admin. Record 5.

While petitioner was serving that sentence, the INS revoked his parole and commenced exclusion proceedings

[6] The United States recently suspended the periodic bilateral discussions because of the Cuban government's refusal to discuss migration issues seriously, including the repatriation of Cuban nationals. The existing migration accords between the two countries remain in effect, however, and the repatriation of some excluded criminal aliens to Cuba is continuing.

against him based on his criminal convictions. In December 1994, an immigration judge determined that petitioner is inadmissible and ordered him removed to Cuba. Pet. App. 4a. Petitioner did not appeal that order.

In 2001, at the completion of petitioner's state prison term, the INS returned him to immigration custody. Pet. App. 5a. Pursuant to the Mariel Cuban Review Plan, petitioner received an annual review of his eligibility for parole, 8 C.F.R. 212.12(g), and, in September 2003, petitioner was notified that he is a candidate for release. Gov't Cert. Br. 8-9. Petitioner presently is enrolled in a drug treatment program, which he is projected to complete in August 2004. If he successfully completes the program, he will be designated to a halfway house for approximately 30 days and then released to a sponsor.[7]

[7] There are five other cases currently pending before this Court presenting the same question that petitioner does. In *Crawford* v. *Martinez*, No. 03-878 (consolidated for argument with the instant case), Martinez had his parole revoked after committing a series of crimes, including burglary, two separate assaults with a deadly weapon, and sexual assault with a knife. 03-878 Pet. at 7-8. In *Perez-Aquillar* v. *Ashcroft*, No. 03-8075, Perez-Aquillar repeatedly committed sexual crimes against children and was arrested for possession of a controlled substance while on parole. 03-8075 Resp. Br. at 4. In *Crawford* v. *Riveron-Aguilera*, No. 03-1265, Riveron-Aguilera committed aggravated criminal sexual assault, rape with a gun, robbery, kidnaping, and possession of controlled substances while on parole. 03-1265 Pet. at 4-5. In *Alcanter* v. *Pedroso*, No. 03-1436, Pedroso was convicted while on parole of carrying a concealed weapon, second degree burglary, battery with corporal injury, exhibiting a deadly weapon, vandalism, corporal injury, and threats with intent to terrorize. 03-1436 Pet. at 5. In *Sierra* v. *Ashcroft*, No. 03-8662, Sierra committed "a series of serious criminal acts" while on parole, including carrying a deadly weapon, theft, and breaking and entering. 03-8662 Pet. App. at 4a.

3. Procedural History

In January 2002, petitioner filed a habeas corpus petition, under 28 U.S.C. 2241, in federal district court. J.A. 3-25. The district court denied the petition (Pet. App. 27a-31a) on the ground that petitioner's detention is statutorily authorized by 8 U.S.C. 1231(a)(6), and is not limited by the presumptive six-month cap on detentions of former lawful permanent residents adopted by this Court in *Zadvydas*, *supra*. In *Zavydas*, the Court adopted that cap to avoid the "serious constitutional problem," 533 U.S. at 690, that the Court thought would arise from the indefinite detention of aliens previously admitted for permanent residence, *id.* at 682, 689.

The court of appeals affirmed. Pet. App. 1a-26a. The court reasoned that the language of 8 U.S.C. 1231(a)(6) "expressly authorizes the Attorney General to detain aliens beyond the 90-day removal period." Pet. App. 9a. The court found the presumptive six-month detention cap established in *Zadvydas* for former lawful permanent resident aliens to be inapplicable because petitioner "is, and remains, an inadmissible alien and is similar to any other alien who has not gained entry and is stopped at this country's border." *Id.* at 15a-16a.[8] The court of appeals further determined that precedents of this Court and the Eleventh Circuit foreclose petitioner's constitutional challenge to his detention, because "[a]liens seeking admission to the United States * * * must be content to accept whatever statutory rights and privileges they are granted by Congress." *Id.* at 18a (quoting *Jean* v. *Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985), and citing *Mezei*, *supra*). The

[8] The court of appeals determined that the government had waived any argument that petitioner's detention is governed by pre-IIRIRA law. Pet. App. 8a n.13. The government does not contest that determination in this case.

court thus concluded that requiring the release of excluded aliens from detention would result in a "drastic expansion of the rights of inadmissible aliens, who have never gained entry into this country," Pet. App. 25a, and would "pervert" Congress's "gift" of discretionary parole by transforming it into an entitlement to release, *id.* at 26a. The court of appeals also stressed that, while *Zadvydas*'s rule for permanent residents did not leave any "unprotected spot in the Nation's armor" against the initial entry of aliens into the United States, *id.* at 23a (quoting *Zadvydas*, 533 U.S. at 695-696), requiring the release of aliens, stopped at the border after they have been barred from entering, would "subject the residents of this nation to greater security risks," Pet. App. 24a.

SUMMARY OF ARGUMENT

Petitioner's continued detention is lawful because he has never been formally admitted into the United States, and a century of precedent and practice make clear that there is nothing legally or constitutionally questionable about excluding aliens, even for life, from entry into the United States. Indeed, the power to exclude aliens is an essential attribute of the United States' sovereignty, to be exercised exclusively by the Executive Branch and Congress. The detention of petitioner is the only means by which the United States can enforce exclusion when foreign governments turn their backs on their own citizens.

Petitioner claims a statutory and constitutional right to be paroled into the United States, rather than detained. No such right exists. The Attorney General granted petitioner and the other excluded aliens whose cases are pending before this Court parole upon their arrival as a humanitarian gesture, rather than leaving them to drown or die of dehydration in the open seas. The United States Government went even further and offered the aliens the opportunity to

become lawful permanent residents. Petitioner and the other aliens responded to those offers by committing crime after crime within this country.

In petitioner's view, the United States government has not been generous enough, and he insists that he has a right to be released, notwithstanding any express determination by the government that he poses a risk to the public. But Congress expressly provided in IIRIRA that such inadmissable and criminal aliens "may be detained" even after the removal period has passed, 8 U.S.C. 1231(a)(6), and Congress left unaffected the discretionary authority of the Attorney General under 8 U.S.C. 1182(d)(5)(A) to either grant or deny parole to aliens stopped at the border and to revoke the parole of such aliens after they have been released. Nothing in those statutory provisions or in constitutional principles vests excluded criminal aliens with an entitlement to rejoin the communities they have already victimized. Nor does this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), require such a result. *Zadvydas* held only that there is a presumptive six-month cap on detentions for aliens who previously had been granted lawful permanent resident status, because their ongoing detention raised substantial constitutional concerns. The ongoing *exclusion* of aliens who have never been admitted to the United States and whose own recidivist criminal behavior has divested them of the opportunities for residence or parole offered by the government raises no similar constitutional concerns.

Finally, the foreign policy and national security concerns that the Court considered to be absent in *Zadvydas* would be squarely joined were the courts to compel the release into this country of aliens that the political Branches have together determined should be excluded. Such a ruling would provide an open channel for foreign governments to thrust their unwanted citizens and dangerous individuals into

American society. It blinks reality to read into Congress's express authorization for the Executive Branch to *detain* excluded criminal aliens a sea change in those aliens' liberty interests or an intent to render the United States more vulnerable to the insinuation of dangerous individuals or other forms of manipulation by foreign powers.

ARGUMENT

SECTION 1231(A)(6) OF TITLE 8 PERMITS THE CONTINUED EXCLUSION, THROUGH DETENTION BEYOND THE STATUTORY REMOVAL PERIOD, OF CRIMINAL ALIENS WHO HAVE NOT BEEN ADMITTED TO THE UNITED STATES AND WHO CANNOT BE IMMEDIATELY REMOVED

Section 1231(a)(6) of Title 8 expressly authorizes the Secretary to "detain[] beyond the removal period" aliens whose removal cannot be effected within the statutory 90-day removal window. With respect to excluded criminal aliens, the statute should be construed to mean exactly what it says and to permit their continued detention, even when removal is not immediately foreseeable. That is because aliens stopped at the border and then formally ordered to be excluded have never enjoyed any statutory or constitutionally recognized liberty interest in release into the United States. Recidivist criminal aliens like petitioner and the other excluded aliens whose cases are pending, see note 7, *supra*, are particularly ill-positioned to ask this Court to read into a *detention* statute a novel liberty interest that entitles them, despite their criminal histories, to be released into the United States over the express objection of the Executive Branch. Furthermore, continued detention is the only practicable means of effectuating the government's legitimate and enduring interest in excluding such aliens from American society.

A. Aliens Stopped At The Border And Denied Admission Lack Any Protected Liberty Interest In Release Into The United States

1. *The Executive and Legislative Branches Have Comprehensive Control Over Immigration*

For more than a century, this Court has repeatedly emphasized that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); see *Chae Chan Ping* v. *United States*, 130 U.S. 581, 606 (1889). That is because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Demore* v. *Kim*, 538 U.S. 510, 522 (2003) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976), and *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952)). This case is illustrative—Cuba provides a "dramatic example of bending immigration policy to meet a United States foreign policy objective." Fla. Immig. Br. 10 (quoting David W. Engstrom, *Presidential Decision Making Adrift: The Carter Administration and the Mariel Boatlift* 16 (1997)). The judiciary is "ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of those foreign policy objectives or the political Branches' implementation of them through the admission or removal of particular aliens. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999). For that reason, "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades*, 342 U.S. at 589; see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (deference on immigration matters is "especially appropriate" because "officials 'exercise especially sensitive political functions that implicate

questions of foreign relations'") (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)).

The singular authority of the political Branches over immigration derives from the "inherent and inalienable right of every sovereign and independent nation" to determine which aliens it will admit or expel. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893). Indeed, the power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe," is not only "inherent in sovereignty," but also "essential to self-preservation." *Ekiu* v. *United States*, 142 U.S. 651, 659 (1892); see *Ping*, 130 U.S. at 603-604 ("Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence."). That power is vital "for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972). The power to exclude is a legislative and an "inherent executive" power. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

2. *The Executive and Legislative Branches Have Plenary Control Over Aliens at the Border*

The political Branches' comprehensive control over immigration matters reaches its apex when dealing with aliens who are stopped at the border and are seeking admission to the United States:

> This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for

> the power to admit or exclude aliens is a sovereign prerogative. * * * Our recent decisions confirm that view. * * * [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.

Landon v. *Plasencia*, 459 U.S. 21, 32 (1982); see also *United States* v. *Flores-Montano*, 124 S. Ct. 1582, 1585 (2004) ("The Government's interest in preventing the entry of unwanted persons * * * is at its zenith at the international border."). That legal "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas*, 533 U.S. at 693.[9] And with respect to excluded aliens, "the Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has for-

[9] See also *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993) ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category."); *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958) (rights and privileges accorded resident aliens are denied to those merely "on the threshold of initial entry"); *Mezei*, 345 U.S. at 212 ("aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"; "[b]ut an alien on the threshold of initial entry stands on a different footing"); *Knauff*, 338 U.S. at 543 ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."); *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925) (an "excluded" alien was "still in theory of law at the boundary line and had gained no foothold in the United States").

bidden." *Mandel*, 408 U.S. at 766 (internal quotations omitted).

That distinction between the rights and protections accorded aliens stopped at the border and those who have been admitted by our government is one of constitutional magnitude:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.

Kwong Hai Chew v. *Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)); see *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").[10]

More particularly, this Court has "long held" that aliens stopped at the border have no constitutionally protected liberty interest in release into the United States. *Plasencia*, 459 U.S. at 32. "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Ibid.*; see *Mezei*, 345 U.S. at 210 ("[N]o alien so situated 'can force us to admit

[10] See *Plyler* v. *Doe*, 457 U.S. 202, 212-213 n.12 (1982) (Court's equal protection ruling did not encompass excluded aliens, due to "the long-standing distinction between exclusion proceedings, involving the determination of admissibility, and deportation proceedings"); *Mandel*, 408 U.S. at 762, 768-770; *United States* v. *Ju Toy*, 198 U.S. 253, 263 (1905); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904) (excluded alien does not enjoy First Amendment protections: "[T]hose who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.").

him at all.'") (quoting *Mezei*, 195 F.2d 964, 970 (2d Cir. 1952) (Learned Hand, J., dissenting)). In fact, this Court's decision in *Mezei* flatly rejected the identical liberty interest asserted by petitioner here. Mezei was stopped at the border and ordered excluded, but no other country would accept him. As this Court described it, "[t]he issue [was] whether the Attorney General's continued exclusion" of Mezei "amount[ed] to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements are made for his departure abroad." 345 U.S. at 207. The Court held that Mezei enjoyed only those protections that the political Branches chose to afford him. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212 (quoting *Knauff*, 338 U.S. at 544). Thus, as this Court recently reaffirmed in *Zadvydas*, in analyzing an alien's interest in being free from detention, his status as an excluded alien will "ma[k]e all the difference." 533 U.S. at 693; see also *Ekiu*, 142 U.S. at 659-660.[11]

That constitutional distinction rests not just on historical conceptions of the power of the national government to control immigration and the very limited rights of individuals arriving at the border, but also on practical separation-of-powers considerations in this sensitive area where foreign

[11] Amici's efforts (ABA Br. 26-30; Germain Br. 17-18) to distinguish *Mezei* as a national security case are misplaced. Although the Court referred to national security concerns in explaining why *Congress* might have chosen to exclude aliens like Mezei, the Court's holding concerning the constitutionality of his continued detention was categorical: "[Mezei's] right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." 345 U.S. at 216. Moreover, this Court rejected a similar effort to distinguish prior immigration cases on national security grounds in *Fiallo*, finding "no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue." 430 U.S. at 796.

policy and national security intersect. When an individual is formally admitted to the United States, a court's recognition and protection of a liberty interest does not *cause* the entry. The court's role (*e.g.*, in *Zadvydas*) simply delineates the *consequences*, statutory and constitutional, of an entry that has already been authorized by the political Branches and has been accomplished without judicial intervention. By contrast, when the political Branches have stopped an alien at the border and have made the quintessentially political determination that he should not be admitted or released into the United States, a judicial order compelling his release into the Country would *cause* an entry that the political Branches have refused and, in the process, would directly countermand the specific and individualized entry decision made by those whom the Constitution has charged with protecting the borders and conducting foreign relations. It simply "is not within the province of the judiciary to order that foreigners who have never * * * even been admitted into the country" should "be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches." *Ekiu*, 142 U.S. at 660; see *Knauff*, 338 U.S. at 543; *Yamataya* v. *Fisher*, 189 U.S. 86, 98 (1903).[12]

3. *Parole Does Not Enhance An Excluded Alien's Rights*

Petitioner contends (Br. 37-44) that the political Branches' control over excluded aliens diminishes, and the rights of the

[12] Amici's effort (see Law Prof. 14; ABA Br. 8-13) to cast doubt on *Mezei* by noting the additional process afforded aliens in *Chin Yow* v. *United States*, 208 U.S. 8 (1908), and *Kwock Jan Fat* v. *White*, 253 U.S. 454 (1920)—cases decided prior to *Mezei*—is to no avail. The narrow question presented in those cases "was whether the petitioner was a citizen of the United States before he sought admission." *Tod* v. *Waldman*, 266 U.S. 113, 119 (1924), as modified, 266 U.S. 547 (1925).

aliens increase, once they have been paroled into the United States. That argument is both legally and logically flawed.

First, this Court has repeatedly ruled that the Executive Branch's discretionary parole of an excluded alien does "not alter her status as an excluded alien or otherwise bring her 'within the United States.'" *Leng May Ma* v. *Barber*, 357 U.S. 185, 186 (1958).[13] Indeed, Congress has expressly provided in current law, as it has historically done, that the discretionary parole of an alien "shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A); accord 8 U.S.C. 1101(a)(13)(B). Thus, today, just as in 1958, petitioner's "concept of the effect of parole certainly finds no support in this statutory language." *Leng May Ma*, 357 U.S. at 188. Quite the opposite, petitioner asks this Court to attach legal consequences to parole that would defy duly enacted statutory text, congressional design, more than a century of consistent precedent, and—importantly—the explicit conditions and understandings on which the Attorney General originally granted petitioner and thousands of other aliens discretionary parole.

Second, petitioner's argument misapprehends the nature of parole. The purpose of parole is not to give excluded aliens enhanced legal protections. *Leng May Ma*, 357 U.S. at 190 (parole "was never intended to affect an alien's status").

[13] See also *Sale*, 509 U.S. at 159 (those "temporarily paroled" remain subject to exclusion proceedings); *Mezei*, 345 U.S. at 215 ("But such temporary harborage, an act of legislative grace, bestows no additional rights."); *Rogers* v. *Quan*, 357 U.S. 193, 195 (1958); *Kaplan*, 267 U.S. at 230 (nine-year parole of alien did not alter "the nature of her stay within the territory * * *. She was still in theory of law at the boundary line and had gained no foothold in the United States."); *Ekiu*, 142 U.S. at 661 ("Putting her in the mission house, as a more suitable place than the steamship, * * * left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship.").

Rather, "[p]arole is an act of extraordinary sovereign generosity" because it "grants temporary admission" into the United States "to an alien who has no legal right to enter and who would probably be turned away at the border if he sought to enter by land, rather than coming by sea or air." *Jean* v. *Nelson*, 727 F.2d 957, 972 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985). Parole thus "is simply a device through which needless confinement is avoided while administrative proceedings are conducted" and while removal is effectuated. *Id.* at 969 (quoting *Leng May Ma*, 357 U.S. at 190). Furthermore, when masses of aliens flood the border, arriving under conditions in which their physical exclusion or forced return would imperil their lives, parole allows the United States to respond to that crisis and to manage the foreign relations implications of the influx in a decent, civilized, and humane manner. *Ibid.*; U.S. Comm'n on Immigration Reform, *Legal Immigration: Setting Priorities* 157 (1995) ("Parole also provides great flexibility to the executive branch to respond to humanitarian and foreign policy situations."); see 8 U.S.C. 1182(d)(5)(A) (allowing parole for "urgent humanitarian reasons").

Because parole does not alter the alien's legal status, the government is able to exercise such compassion and protect the short-term safety of aliens who have arrived at our shores without endangering the government's ability, in the long run, to ensure the safety and security of the American public by returning the aliens to physical custody if necessary to protect society. See 52 Fed. Reg. at 48,799 (use of parole in Mariel Cuban crisis balanced individual and public interests). If, however, petitioner's view were adopted, that calculus would change. The inevitable, practical consequence of granting parole would be to restrict the government's ability to prevent dangerous aliens from circulating through American society. It would also reward the foreign powers that generate such humanitarian crises by

signaling to them that mass migrations weaken Congress's and the President's control over the borders and facilitates the infiltration of dangerous individuals onto American streets.[14] Petitioner's position, in short, would restrict the President's and Congress's flexibility in responding to humanitarian migration emergencies by forcing them to choose, during the heat of the crisis, between the immediate physical safety and security of the aliens and the long-term safety and security of the American public. That position may well prove more harm than help to aliens. See *Leng May Ma*, 357 U.S. at 190 (treating parole as altering the excluded alien's legal status "would be quite likely to prompt some curtailment of current parole policy"). Thus, while petitioner attacks his detention as "offend[ing] any sense of fairness" (Br. 17), petitioner would have this Court adopt, for the sake of the liberty of those few excluded criminal aliens who already have proven themselves least deserving of release into free society, a conception of parole that weights the scales in favor of mass and prolonged detention for *all* arriving aliens at the border (see Pet. Br. 21, 49). It is hard to see the fairness in that approach.

Amicus counters (ACLU Br. 27) that, when parole is prolonged, the alien may develop substantial ties to the community. That may be. But "[w]e doubt that the Congress intended the mere fact of delay to improve an alien's status from that of one seeking admission to that of one legally

[14] See *Ping*, 130 U.S. at 604 ("If [a nation] could not exclude aliens it would be to that extent subject to the control of another power."); *Rosales-Garcia* v. *Holland*, 322 F.3d 386, 419 (6th Cir.) (Boggs, J., dissenting) (criticizing the majority's holding extending *Zadvydas* to excluded aliens because, if "hundreds of thousands" of non-removable aliens "present themselves at our borders, * * * the government of the United States is constitutionally disabled from doing anything, after a short interval, other than set all such persons at liberty in our country"), cert. denied, 123 S. Ct. 2607 (2003).

considered within the United States." *Rogers*, 357 U.S. at 196. If the alien develops ties, he does so with the full knowledge that his release on parole is temporary and conditional. *Harisiades*, 342 U.S. at 586-587 ("[T]o protract this ambiguous status within the country is not his right but is a matter of permission and tolerance."). Congress, moreover, has provided other mechanisms for dealing with such assimilation, chiefly the opportunity provided to Mariel Cubans to adjust their status to that of lawful permanent resident. See 8 U.S.C. 1255 note.

Beyond that, this case and the others pending before the Court are not about paroled aliens who established stable and law-abiding lives in the United States. Those individuals are not being detained. Rather, this case is about aliens who have spent a significant portion of their time in the United States in the American criminal justice system. The fact is that the government offered petitioner the keys to the liberty he now seeks, through his first parole and the opportunity to adjust his status. He threw those keys away. The same self-chosen behavior that caused his parole to be revoked and rendered him ineligible for adjustment of status leaves him ill-positioned to claim some sort of reliance interest in his community ties.

B. The Text, Structure, And History of Section 1231(a)(6) Confirm The Executive Branch's Authority To Detain Excluded Criminal Aliens

1. *The Statutory Text and Structure Support the Secretary's Detention Authority*

In providing, in 8 U.S.C. 1231(a)(6), that excluded aliens "may be detained beyond the removal period," Congress acted against the long-established background principle—which was voiced with particular clarity in *Mezei* and *Leng May Ma*—that excluded aliens have no liberty interest in being released into the United States and that their release

on parole is committed to the discretion of the Executive. Nothing in the text of Section 1231(a)(6), which affirmatively *authorizes* detention, supports petitioner's proposed contraction of the Executive Branch's historic authority to detain aliens stopped at the border. To the contrary, the language "suggests discretion," and "literally" sets no time limit on the detention of excluded aliens who cannot be removed. *Zadvydas*, 533 U.S. at 689, 697.

The overall structure of IIRIRA reinforces the Executive Branch's power to detain excluded aliens beyond the removal period. As an initial matter, it would be particularly inappropriate to read into Section 1231(a)(6) a "drastic expansion of the rights of inadmissible aliens," Pet. App. 25a, in the face of Congress's express statutory directive that Section 1231 not be construed to "create any substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. 1231(h). Furthermore, at the same time that it enacted Section 1231(a)(6), Congress adjusted the rights of aliens who had entered the United States both legally and illegally. See H.R. Rep. No. 879, 104th Cong., 2d Sess. 107 (1997). With respect to aliens stopped at the border, Congress retained and strengthened the statutory restrictions. Congress, for example, preserved the Attorney General's (now the Secretary's) discretion to detain or parole such aliens into the United States, including both during their removal proceedings and pending their physical removal, compare 8 U.S.C. 1182(d)(5)(A), 1226(e)(1) and (3) (1994), with 8 U.S.C. 1182(d)(5)(A), 1225(b)(1)(B)(iii)(IV), 1226(c)(1)(A), 1231(a)(6) (2000), and continued to provide that parole is not an admission and remains discretionary, temporary, conditional, and subject to revocation, compare

8 U.S.C. 1182(d)(5)(A) (1994), with 8 U.S.C. 1101(a)(13), 1182(d)(5)(A) (2000).[15]

That retention of the Executive's discretionary parole authority, 8 U.S.C. 1182(d)(5)(A), is particularly instructive. That provision allows the Secretary, "in his discretion," to "parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." The tenor of that Section indicates that Congress expected the parole of excluded aliens to be an exceptional act of grace. See *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1446 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995); *Amanullah* v. *Nelson*, 811 F.2d 1, 6 (1st Cir. 1987). Further, a necessary concomitant of that discretionary authority to grant parole is the parallel authority *not* to parole—and instead to detain—aliens stopped at the border. Accordingly, the Secretary's authority to detain excluded aliens pending their removal has its roots not only in Section 1231(a)(6), but also in Section 1182(d)(5)(A). Petitioner's argument that Section 1231(a)(6) should be read to make mandatory for those criminal aliens who abused their parole privilege and became subject to final orders of removal the very release on parole that Section 1182(d)(5)(A) expressly makes exceptional and discretionary for *all* aliens who were stopped at the border

[15] Congress also (i) carried forward the provisions delineating which classes of aliens cannot be admitted to the United States, compare 8 U.S.C. 1182(a) (1994), with 8 U.S.C. 1182(a) (2000 & Supp. I 2001); (ii) again directed the Attorney General to detain such aliens on arrival pending their exclusion or removal proceedings, compare 8 U.S.C. 1225(b), 1226 (1994), with 8 U.S.C. 1225(b)(1)-(3), 1226(c)(1)(A) (2000); and (iii) reiterated the mandate that the Attorney General promptly remove aliens ordered excluded, compare 8 U.S.C. 1227(a)(1) and (2) (1994), with 8 U.S.C. 1231(b)(1) and (c) (2000).

and denied admission turns the congressional design on its head.

Petitioner counters that, having already been construed in *Zadvydas* to impose a presumptive six-month cap on detentions, the text of Section 1231(a)(6) "should not and cannot change depending on the pedigree of the alien" (Br. 23). This Court certainly thought otherwise in *Zadvydas*. If an alien's status were irrelevant, there would have been no point to opening the opinion with the reservation that "[a]liens who have not yet gained initial admission to this country would present a very different question" (533 U.S. at 682), and then devoting two full pages of the opinion (*id.* at 693-694) to discussing what was twice described as the "critical" distinction (*ibid.*) between excluded aliens and those already present in the United States. Nor would the Court have eschewed "consider[ing] the political branches' authority to control entry into the United States." *Id.* at 695. Furthermore, the Secretary's authority to detain excluded aliens derives not just from Section 1231(a)(6), but also from Section 1182(d)(5)(A)'s general parole authority for excluded aliens. That distinct authority was not implicated in *Zadvydas*. But in this case, the two statutory provisions must be read *in pari materia*.

Furthermore, petitioner overlooks that the statutory language construed in *Zadvydas* was the word "may" in the phrase "may be detained," 533 U.S. at 697. That language, under *Zadvydas*, authorizes detention until it approaches constitutional limits. In addition, "may" is not the type of word that bespeaks a single, uniform, and unbending application across statutorily and constitutionally divergent applications. To the contrary, it suggests flexibility and discretion to adapt to different contexts. Thus nothing in the statutory text precludes recognition that the detention authority varies in scope based on circumstances.

Petitioner next suggests (Br. 31) that it would be "cruel and capricious" to have the meaning of the same words change based on "the background or pedigree of the petitioner." That cannot be right. Surely petitioner does not consider the Due Process Clause of the Fifth Amendment—the constitutional fount of the very liberty interest that he claims—to be "cruel and capricious." Yet the scope of that Clause's protection routinely turns upon the background or pedigree of the individual, such as membership in a class afforded special protection, see, *e.g.*, *Miller* v. *Albright*, 523 U.S. 420 (1998), or, in the case of aliens, whether they are inside or outside the United States, see *Zadvydas*, 533 U.S. at 693; *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). Petitioner, as an alien stopped at the border, is in the latter category.

Nor would this be the first time, in the field of immigration law, in which legal status and rights would vary depending upon the categorization of an alien. "[I]t is 'a routine and normally legitimate part' of the business of the Federal Government to classify on the basis of alien status, [and] * * * to 'take into account the character of the relationship between the alien and this country.'" *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982) (quoting *Diaz*, 426 U.S. at 80, 85). In *Zadvydas* itself, the Court acknowledged that the detention authority might differ in cases involving "terrorism or other special circumstances." 533 U.S. at 696. In *Reno* v. *Flores*, 507 U.S. 292 (1993), the same words in a single statutory provision that, like Section 1231(a)(6), provided that the Attorney General "may" detain an alien, see 8 U.S.C. 1252(a)(1) (1988), supported different applications for juvenile aliens and adults. Indeed, petitioner presumably would agree that Section 1231(a)(6)'s presumptive cap on the detention of resident aliens would tolerate the lengthier detention of a juvenile if there were no appropriate sponsor. And petitioner himself suggests that, for constitutional rea-

sons (Br. 37-44), his reading of Section 1231(a)(6) might not apply to excluded aliens who have never been paroled. At bottom, then, petitioner's argument is not so much a demand for uniformity as it is a selective opposition to any variations in the Secretary's detention authority that are adverse to *his* situation.

Petitioner further argues (Br. 31) that no decision "in any American court" has construed the same words of a statute one way for constitutional reasons and another way when those same constitutional constraints do not apply. *Crowell* v. *Benson*, 285 U.S. 22 (1932), did. In that case, the Court construed statutory language that provided a commission "'full power and authority to hear and determine all questions.'" *Id.* at 62. In light of what the Court regarded as the substantial constitutional question that would arise if the quoted language precluded judicial review of jurisdictional facts, the Court construed the language to permit review of those facts, even though the same statutory language continued to limit or preclude judicial review of facts pertaining to, *e.g.*, the employees' injuries. *Id.* at 46, 54, 62.[16] Petitioner's insistence on the wooden extension of the result in *Zadvydas* to the critically different context of excluded aliens thus cannot be justified as the ineluctable byproduct of past practice.[17]

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[16] See also *Xi* v. *INS*, 298 F.3d 832, 841 (9th Cir. 2002) (Rymer, J., dissenting); cf. *Lane* v. *Pena*, 518 U.S. 187, 196-197 (1996) (statutory language that permits monetary damages against municipal defendants and others does not permit monetary damages against the federal government).

[17] Petitioner and his amicus also make much (Pet. Br. 25; ACLU Br. 11-12) of Justice Kennedy's comment in his *Zadvydas* dissent (see 533 U.S. at 710) that construing Section 1231(a)(6) to operate differently for excluded aliens is not "plausible." But Justice Kennedy considered any argument that the majority's holding does embrace excluded aliens—the very argument that petitioner now advances—to be equally unsustainable. *Ibid.* Beyond that, Justice Kennedy's "comments in [his] dissenting

2. *The Legislative History Supports the Secretary's Detention Authority*

The history of IIRIRA's enactment documents that Congress was legislating exactly contrary to petitioner's supposition that the authority to detain excluded aliens was narrowed and capped. Congress enacted IIRIRA, not to enhance the rights of excluded aliens, but to combat the growing problem of criminal recidivism by aliens and to diminish the rights of aliens who have illegally entered the country. Underlying IIRIRA was Congress's recognition that "[c]riminal aliens cost our criminal justice systems hundreds of millions of dollars annually and are generally perceived to be a serious and growing threat to public safety." GAO, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to Be Improved* 3 (July 15, 1997) (explaining impetus for 1996 legislation); see U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* 153 (1994) ("[T]he top priority of enforcement strategies should be the removal of criminal aliens from the U.S."). One of IIRIRA's sponsors stressed that "[r]ecidivism rates for criminal aliens are high," citing a General Accounting Office study that found that "77 percent of noncitizens convicted of felonies are arrested at least one more time." 142 Cong. Rec. 7972 (1996).[18]

In June 1995, the House of Representatives considered a bill, H.R. 1915, designed to improve the "removal of illegal and criminal aliens." H.R. Rep. No. 879, 104th Cong., 2d

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opinion * * * are just that: comments in a dissenting opinion." *Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 n.10 (1980).

[18] See also *Kim*, 538 U.S. at 518-519 (noting evidence before Congress of high rates of recidivism, including that 45% of deportable criminal aliens were arrested multiple times); *Criminal Aliens*, *supra*, at 7 (in one study, 23% of released aliens had been rearrested for crimes, including 184 felonies).

Sess. 105 (1997). That bill proposed "more stringent standards for the release of aliens (particularly aliens convicted of aggravated felonies) during and after removal proceedings." H.R. 1915, 104th Cong., 1st Sess. § 300(3), at 36 (1995). The bill specifically provided that, upon expiration of the removal period, excluded aliens could be continued in detention. *Id.* § 305(3), at 83-84 ("An alien ordered removed who is inadmissible under section [1182] may be detained beyond the removal period and, if released, shall be subject to [statutory] terms of supervision."). That bill was aimed at "increas[ing] detention of aliens who are ordered removed." H.R. Rep. No. 879, *supra*, at 108.

The detention provisions of H.R. 1915 were incorporated into H.R. 2202, 104th Cong., 1st Sess. (1995), the bill that ultimately became IIRIRA. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 18-19, 25-26, 234 (1996); H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 210-211 (1996). As modified in conference, IIRIRA allowed, but did not require, the release on supervision of aliens who were not removed during the removal period. H.R. Conf. Rep. No. 828, *supra*, at 53-54, 215-216. Importantly, in passing the provision authorizing continued detention after the removal period, Congress was fully aware that certain countries have refused to accept the return of their nationals.[19] Moreover, before IIRIRA's enactment, the long-term detention of Mariel Cubans had been upheld by courts and had been the subject of extensive congressional hearings. See *Barrera-Echavarria*, 44 F.3d at 1447 ("Congress has for at least four decades been aware of instances of long-term detention of

[19] See IIRIRA § 307(a), 110 Stat. 3009-614 (amending 8 U.S.C. 1253(d) to authorize the Secretary of State to discontinue granting immigrant visas to citizens of a country that "denies or unreasonably delays" accepting the return of its own nationals); IIRIRA § 303(b)(3)(B)(ii), 110 Stat. 3009-587.

excludable aliens by the executive branch."); *ibid.* n.5 (listing congressional hearings); *Restoring Credibility*, *supra*, at 171 ("[L]ong-term detention has been a common response to immigration emergencies," including "the Mariel boatlift."). There is not a hint of any intent to restrict such detentions in the legislative history of IIRIRA, and "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999).

Furthermore, while Congress had in the past imposed time limits on the detention of aliens who had gained admission to the country, see *Zadvydas*, 533 U.S. at 697-698, the detention of aliens stopped at the border and then formally excluded has never been subject to such time limits. See *Mezei*, 345 U.S. at 208-209, 216; *Palma*, 676 F.2d at 104. In fact, Congress, in the past, has declined to enact legislation that would have imposed just such a time limit. See H.R. 4349, 100th Cong., 2d Sess. § 1(a) (Mar. 31, 1988); H.R. 5200, 100th Congress, 2d Sess. § 1(a) (Aug. 10, 1988). Section 1231(a)(6) thus should not be interpreted to provide the very right to parole that Congress has long declined to afford excluded aliens.

3. *The Six-Month Cap Adopted in* Zadvydas *Does Not Apply to Excluded Aliens*

In *Zadvydas*, the Court crafted a presumptive six-month cap on the post-order detention of former lawful permanent residents whose removal cannot be effectuated. The Court did so as a means of implementing its determination that Section 1231(a)(6) implicitly limits the detention of such aliens to a time period that reasonably serves the purposes of detention. 533 U.S. at 701. The Court inferred that "implicit limitation" to avoid the serious constitutional question that would arise were the statute read to permit the indefinite detention of aliens who already had effected an

entry into the United States. *Id.* at 689. That judicially inferred limitation, however, cannot logically be extended to the detention of excluded aliens, for two reasons.

a. ***Preserving the Secretary's Detention Authority Serves Important Purposes.*** In *Zadvydas*, this Court explained that detention of an alien who had been admitted for lawful permanent residence before being ordered removed becomes problematic under the Due Process Clause when the detention "no longer bears a reasonable relation to the purpose for which the individual was committed." 533 U.S. at 690 (quoting *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972) (internal brackets and quotation marks omitted)). For aliens previously admitted for permanent residence, the primary purpose of detaining the aliens after entry of a final order of removal is to "assur[e] the alien's presence at the moment of removal." *Zadvydas*, 533 U.S. at 699. The Court found that purpose insufficient to permit detention beyond what it concluded was a reasonable time to effect removal—presumptively, six months—because the need to "prevent[] flight * * * is weak or nonexistent where removal seems a remote possibility at best." *Id.* at 690. The Court also recognized that detention could protect the community from danger, but noted that "the alien's removable status itself[] * * * bears no relation to a detainee's dangerousness." *Id.* at 692.

By contrast, the "basic purpose" (*Zadvydas*, 533 U.S. at 699) of detaining aliens who were stopped at the border and then formally excluded through a final order of removal is exclusion itself. The central means of effectuating exclusion is to stop and hold the individual. *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 291 (1904) ("Detention or temporary confinement [i]s part of the means necessary to give effect to the exclusion."); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) (same). That purpose, moreover, does not diminish when a removal order cannot be executed.

To the contrary, when, due to their mode of arrival or the home government's refusal to accept them, aliens cannot physically be turned back at the border, the only means of exercising the United States' sovereign prerogative to exclude those aliens and to prevent them from entering American society is to detain them. There thus is a 100% correlation between the alien's excluded status and the purpose of ongoing detention, which plainly satisfies the *Zadvydas* requirement that there be a "reasonable relation" between the detention and its purpose. See 533 U.S. at 690. In addition, the government's fundamental interest in protecting the Nation's borders furnishes a "sufficiently strong special justification" to permit civil detention for purposes of consitutional analysis, see *Zadvydas*, *id.* at 690—and therefore for purposes of statutory analysis under the principle of constitutional avoidance, see *id.* at 699.

While conditional parole on the terms established by the Secretary and upon a determination by the Secretary that the alien does not pose a risk to the community is consistent with the political Branches' power of exclusion, the judicially compelled parole of an alien whom the Secretary has refused to parole because he is "likely to pose a threat to the community," unlikely "to remain nonviolent," or "likely to violate the conditions of his parole," 8 C.F.R. 212.12(d)(2); see also 8 C.F.R. 241.4(d)(1), does not comport with the historic power of exclusion. The whole purpose of exclusion is to protect the Nation prospectively from a perceived risk and to prevent harms before they happen. A judicial order of release, even if accompanied by "release conditions that may not be violated," *Zadvydas*, 533 U.S. at 696, does not adequately vindicate that interest. The nature of release conditions and the day-to-day resource constraints on immigration officials preclude the close monitoring of every paroled alien that would be necessary to preempt repeat criminal activity by those aliens whom the political Branches

have deemed unfit for release and who have statistically high rates of recidivism. The parole system, instead, is structured largely to respond after the fact to such crimes with parole revocation. Accordingly, the forced parole of excluded aliens whom the Secretary has determined pose a threat to the safety and security of the community works an expansion of the excluded alien's rights, at the expense of the public, and directly undermines the historic role and purpose of exclusion.

Some compromise of the alien's and society's competing interests may be appropriate for the *Zadvydas* aliens who had previously been admitted as lawful permanent residents and who thus were being "uprooted from our midst." *Mezei*, 345 U.S. at 215. Such aliens may have cognizable interests in "rejoin[ing] the community until the Government effects their leave." *Id.* at 215-216. But that rationale has no logical application to aliens like petitioner, who were stopped at the border and then formally ordered excluded after committing crimes while released on discretionary parole. Those aliens were uprooted, not by the government, but by their own private choices, and they have no arguable preexisting liberty interest in or claim to join or rejoin American society. Indeed, aliens stopped at the border and then later ordered excluded, like the juvenile aliens in *Reno* v. *Flores*, *supra*, "are always in some form of custody." 507 U.S. at 302 (quoting *Schall* v. *Martin*, 467 U.S. 253, 265 (1984)). For them, "liberty" is *not* "the norm." *Foucha* v. *Louisiana*, 504 U.S. 71, 83 (1992). Rather, the constitutional and statutory starting point for such aliens is custody, not liberty. When their own criminal conduct leads to revocation of their parole, the only practicable option for the government is to revert back to detention.

Finally, a judicial decision requiring the Secretary, against his best judgment, to parole recidivist criminal aliens and others who have repeatedly violated parole conditions in the

past would undercut the incentives for compliance with the Secretary's terms of parole. Criminal aliens may quickly deduce that the availability of parole will be little affected by their misconduct. Reading *Zadvydas* as bestowing on excluded aliens the very privilege that was "denied them when their immigration parole was revoked on the basis of their criminal activity," *Gisbert* v. *Attorney General*, 988 F.2d 1437, 1447 (5th Cir.), as amended, 997 F.2d 1122 (1993), thus could undermine significantly the Secretary's "enforcement leverage" and the functioning of the parole system as a whole. *Morrissey* v. *Brewer*, 408 U.S. 471, 478 (1972). And it would do so at the very same time that parole would be judicially mandated for those aliens who pose the greatest risk to the public and for whom vigorous parole-compliance incentives are most needed.

b. *Extending Zadvydas to excluded aliens would create, not avoid, constitutional problems.* *Zadvydas*'s presumptive limit on detention was driven by constitutional doubt concerning the lawfulness of open-ended detention for aliens who had been affirmatively granted the status of lawful permanent residents. 533 U.S. at 689. No such constitutional considerations obtain here. See Section A(2), *supra*. Indeed, *Zadvydas* itself found the distinction between excluded aliens and those who have entered to be "critical" and to "ma[k]e all the difference" on the constitutional front. 533 U.S. at 693; see also *id.* at 682. Because there are no constitutional problems to avoid when the detention involves excluded aliens, Section 1231(a)(6)'s provision that the Secretary "may" detain excluded aliens should be accorded its ordinary and established meaning, which "suggests discretion" to detain—a discretion that has not historically included temporal limitations. *Id.* at 697.

Petitioner contends (Br. 22-31), however, that *Zadvydas*'s special, constitutionally driven rule should now control all applications of the statute. Excluded aliens, petitioner

argues (Br. 24), should effectively get to ride the litigation coattails of the lawful permanent residents in *Zadvydas*. But it is not that simple. The Constitution charges Congress, through Article I, and the President, through the Presentment Clause, Art. I, § 7, Cl. 2, with the drafting and enactment of legislation. The judiciary's task is to "interpret, rather than author," federal laws. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 n.7 (2001). The Court is "not at liberty to rewrite" Section 1231(a)(6). *Id.* at 495 n.7. When, as occurred in *Zadvydas*, the Court reads "implicit" "significant limitations" into duly enacted statutory text, 533 U.S. at 689, the Court presses the judicial role to its separation-of-powers limits. And the Court does so only when necessary to avoid the likely invalidation of an Act of Congress. "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991).

To function as a doctrine of inter-branch "respect," *Rust*, 500 U.S. at 191, the judicial adoption of "significant" extra-textual statutory limitations, *Zadvydas*, 533 U.S. at 689, must be resorted to only as a matter of strict necessity. To extend judicially developed limitations to new applications, where constitutional pressures do not support the conclusion that Congress intended such a result, would loose the doctrine from its analytical moorings. Accordingly, once the constitutional concerns attending detention of criminal aliens "evaporate," as they do when excluded aliens are at issue, the Court cannot, "through the power of precedent," create "statutes foreign to those Congress intended." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998). It is only when a "serious likelihood" of constitutional invalidation exists that "the doctrine serve[s] its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have

made." *Ibid.* But here, there is no "serious likelihood" that detention—which functionally is just continued exclusion—is unconstitutional as applied to aliens stopped at the border and then formally ordered excluded after committing criminal offenses.

Such circumspection is particularly appropriate in this context because extension of *Zadvydas* to excluded aliens would actually raise rather than avoid significant constitutional questions. The doctrine of construing statutes to avoid constitutional problems is supposed to "minimize disagreement between the branches," not "aggravate that friction." *Almendarez-Torres*, 523 U.S. at 238. Since Congress first began regulating immigration in 1875, see Act of Mar. 3, 1875, ch. 141, 18 Stat. 477, decisions about the admission or exclusion and parole of excluded aliens have been constitutionally assigned to the political Branches, because such decisions are inextricably intertwined with the conduct of foreign relations, Congress's power to regulate naturalization, U.S. Const. Art. I, § 8, and the protection of national security. This Court's cases have recognized and enforced that constitutional demarcation again and again. See Sections A(1) and A(2), *supra*. Simply put, the historic constitutional and statutory paradigms pertaining to excluded aliens and lawful permanent residents are dramatically different, and those historic, practical, and legal distinctions continue today to "ma[k]e all the difference," just as they did three years ago in *Zadvydas*, see 533 U.S. at 693. As a result, there is a difference of constitutional magnitude between courts, on the one hand, declaring and enforcing the constitutional or statutory consequences of entries by aliens that occurred independent of the Judicial Branch, and, on the other hand, courts compelling those entries in the first place over the express determination of the Executive Branch and Congress that an alien should not

be admitted into American society because his criminal recidivism poses a continuing danger to the American public.

Moreover, adopting what would be, for all practical purposes, a time limit on the physical exclusion of aliens would have significant foreign policy and security implications for the United States—areas into which the judiciary should be loath to tread (if at all) without the clearest direction from Congress and the Executive Branch. See generally *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Any diminution in the political Branches' comprehensive control over the borders, the admission of aliens, and the management of international migration crises would render the Nation more vulnerable to manipulation and infiltration by hostile powers and would tie the government's hands in responding to humanitarian emergencies. Because it "would inhibit the flexibility of the political branches of government to respond to changing world conditions," that reading of Section 1231(a)(6) "should be adopted only with the greatest caution." *Diaz*, 426 U.S. at 81; see *Restoring Credibility*, *supra*, at 162-174 (discussing the complexity of immigration emergencies and the government's need for "effective and humane responses").

Cuba is a case in point. The 1980 Mariel boatlift was not the first or the last time the Castro regime used its citizens as "bargaining chips" in an attempt to pressure the United States to modify its policies toward and relations with Cuba. Human Rights Watch/Americas, *Cuba: Repression, the Exodus of August 1994, and the U.S. Response* 2 (Oct. 1994). Banking that "the appearance of loss of control over US borders—coupled with the perception inside the US that Florida might be overrun—would be viewed by US leaders as politically costlier than the alternative of dealing with

him," Castro flooded the United States with 5000 migrants from the Port of Camarioca in 1965.[20]

In 1980, anger over, among other things, the United States' immigration policies toward Cubans, public statements labeling Cuba a Soviet puppet state, and the Peruvian and Costa Rican governments' handling of the 10,000 asylum seekers that had poured into the Peruvian embassy in early 1980, prompted Castro to open the Port of Mariel, flooding the United States with more than 100,000 migrants. Wayne S. Smith, *The Closest of Enemies: A Personal and Diplomatic Account of U.S.-Cuban Relations Since 1957*, at 200-210 (1987); Engstrom, *supra*, at 47-56. As part of that migration assault on the United States, Castro forced thousands of hardened criminals out of his prisons and into the departing boats. 52 Fed. Reg. at 48,799; *Palma*, 676 F.2d at 101.

Castro again resorted to the use of humans as diplomatic weapons in 1994. In an attempt to pressure the United States to ease its economic embargo on Cuba, to alter the immigration policies that had so rankled the Castro regime for decades, and to force the United States into bilateral negotiations, Castro reopened the Port of Mariel, sending tens of thousands of Cubans to the Florida shores.[21] In April 1995, Castro threatened yet another boatlift in an effort to derail the proposed Helms-Burton legislation, see 22 U.S.C.

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[20] Kelly M. Greenhill, *Engineered Migration as a Coercive Instrument: The 1994 Cuban Balseros Crisis* 13 (Feb. 2002); see *id.* at 10-17 (discussing Castro's use of immigration as a foreign policy tool in the 1965, 1980, and 1994 boatlifts); Engstrom, *supra*, at 19; Alex Larzelere, *Castro's Ploy—America's Dilemma: The 1980 Cuban Boatlift* 117 n.* (1988); C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine*, 61 U. Pitt. L. Rev. 287, 312-313 (Fall 1999).

[21] See Greenhill, *supra*, at 17-25; Engstrom, *supra*, at 188; see also *Sale*, 509 U.S. at 163-164 (discussing the difficult international and diplomatic problems occasioned by the 1991 influx of Haitian migrants).

6021-6091. Pet. App. 2a n.1. In light of that history, the ACLU's argument (Br. 29) that this Court can disregard the foreign policy implications of its decision because Cuba is not a "hostile government[]" bent on "forcing us to admit 'dangerous aliens' against our will" is baffling.

Further, as recent events have taught, the Cuban government is not the only foreign power or organization that thinks little of putting civilian lives at risk as part of its hostile endeavors. It is difficult to understate the damage that could occur to the United States' international relations and national security if the government does not speak with one voice in the handling of migration crises at the border, or if foreign powers are told that the President and Congress cannot control the physical infiltration into the United States of criminals and other aliens stopped at the border. The "judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of [the] diplomatic repercussions" and national security consequences that would result from an immigration regime that rewarded foreign governments who evacuate their prisons or other dangerous individuals onto the United States' shores. *Aguirre-Aguirre*, 526 U.S. at 425.[22] Such judgments must be left to Congress and the President. Section 1231(a)(6), for its part, contains no trace of a congressional intent to visit such foreign policy and security consequences

[22] See also *Zadvydas*, 533 U.S. at 711-712 (Kennedy, J., dissenting) ("[O]ther countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us."); *Gisbert*, 988 F.2d at 1447 ("Accepting petitioners' arguments here would allow one country to export its unwanted nationals and force them upon another country by the simple tactic of refusing to accept their return."); *Fernandez-Roque*, 734 F.2d at 582 ("A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back.").

on the United States or to arm hostile governments or organizations with a new diplomatic weapon.[23]

Finally, the United States has a distinct humanitarian interest in dissuading migrants from undertaking treacherous voyages to the United States in ramshackle boats or other vessels that are so unseaworthy as effectively to preclude the government from turning the aliens back. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993). Adoption of an immigration policy that virtually guaranteed such aliens' eventual release into American society would undercut those efforts and encourage more life-endangering migrations, especially when political turmoil in or difficult diplomatic relations with the aliens' native countries suggests that the United States may not be able to effect a repatriation.

In sum, the time constraints on detention that were adopted in *Zadvydas* to avoid a constitutional question can-

[23] Amici suggest (ACLU Br. 15-16; Germain Br. 7-12) that the statutory provisions permitting the removal of alien terrorists offers sufficient protection of the United States' national interests. That argument is flawed on multiple levels. First, the provisions they cite address security risks posed by particular individuals to the United States. They do nothing to address security risks that are created by the policies of foreign governments, rather than the character of individual aliens. Second, while political terrorists can undoubtedly cause harm to the American public, public security can also be threatened on a day-to-day basis by the lawlessness of ordinary criminals. Congress's creation of a special provision to deal with the exigencies of terrorism did not abdicate the government's historic power, through exclusion, to protect the United States from such criminal elements. Third, due to proof difficulties or the sensitivity of using classified information, the government may, at times, find it more expedient to exclude an individual based on his criminality or other factors than to attempt to prove his status as a terrorist. Nothing in the terrorism provisions suggests that Congress denominated that procedural mechanism to be the *sole* avenue for protecting the safety of the United States.

not be extended to excluded aliens without generating even more substantial constitutional problems and inter-Branch tension. Furthermore, while the Court in *Zadvydas* did not perceive the presumptive cap on the detention of lawful permanent residents as threatening the Nation's security, implying a time limit on the physical exclusion of criminal aliens stopped at the border would confound "the political branches' authority to control entry into the United States" and open a large "unprotected spot in the Nation's armor." *Zadvydas*, 533 U.S. at 695-696 (quoting *Kwong Hai Chew*, 344 U.S. at 602).

C. The Existing Parole Scheme Adequately Protects The Interests Of Excluded Aliens Pending Their Removal

The existing federal parole schemes for Mariel Cubans and other aliens stopped at the border fairly balance the governmental and private interests at stake in the detention decision. See *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976). Due process, after all, "is flexible and calls for such procedural protections as the particular situation demands." *Brewer*, 408 U.S. at 481. Procedural due process rules," moreover, "are meant to protect persons not from the deprivation, but from the *mistaken or unjustified* deprivation of life, liberty, or property." *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978) (emphasis added). Thus, even if it is assumed, *arguendo*, that due process principles apply to some extent in this setting, the parole regulations are more than adequate.

The starting point is "analysis of the governmental and private interests that are affected." *Mathews*, 424 U.S. at 334. On the one hand, the government's interest in "preventing danger to the community is a legitimate regulatory goal," *United States* v. *Salerno*, 481 U.S. 739, 747 (1987), and has been "historically so regarded," *Kansas* v. *Hendricks*, 521 U.S. 346, 363 (1997). See also *Salerno*, 481 U.S. at 749

("The government's interest in preventing crime by arrestees is both legitimate and compelling."). And the government's interest in ensuring that its parole mechanism does not operate in a manner that leaves the Nation vulnerable to manipulation by foreign powers is compelling. The public as a whole also has a weighty interest in ensuring that the parole process does not become so procedurally unwieldy or so ineffective at preventing the release of dangerous individuals that the parole program as a whole is forced to be curtailed or abandoned. See *Greenholtz* v. *Inmates of the Nebraska Penal & Corr. Facility*, 442 U.S. 1, 13 (1979). That result, of course, would be contrary to the interests of the prospective parolees themselves. It would also deprive the public of the benefits it receives from the contributions of law-abiding parolees and the value of allowing them to integrate themselves into the life of the community to the extent that the political Branches conclude is consistent with the broader national interest. Cf. *ibid.*

On the private side, the liberty interest of an alien who was stopped at the border, whose subsequent parole has already been revoked at least once, and who has been ordered removed based on a criminal conviction in the United States is virtually non-existent (if it exists at all). Relying on *Morrissey* v. *Brewer*, and *United States* v. *Salerno*, petitioner and his amici (Pet. Br. 37; ABA Br. 23; Law Profs. Br. 15-25) stress the premium that the Due Process Clause places on protecting individuals against deprivations of liberty. But this is not a case about terminating or depriving individuals of a pre-existing liberty. Neither petitioner nor any of the other excluded aliens whose cases are pending before this Court challenges the propriety of his initial detention at the border, his parole revocation, his criminal convictions, or his subsequent redetention. Indeed, petitioner concedes (Pet. Br. 21, 49) the government's authority to detain all excluded aliens inde-

finitely as long as it keeps them physically near the border. The interest asserted here thus is not against the deprivation of preexisting liberty; it is in "being denied a conditional liberty that one desires." *Greenholtz*, 442 U.S. at 9. That is "quite different." *Ibid.*

In *Greenholtz*, the Court stressed the very minimal protection that the Due Process Clause accords to the "natural desire" of those lawfully detained to be released on parole following a criminal conviction. 442 U.S. at 7. As long as the government provides an opportunity to be heard and an explanation of the grounds for denial, the Court concluded, that is all "the process that is due" under the Constitution. *Id.* at 16; see *Mathews*, 424 U.S. at 333 (the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"). If that is all the process that is due to citizens seeking parole, certainly no more process should be demanded when parole is sought by criminal aliens who were stopped at the border when they first arrived and have never acquired any right or liberty interest to be in the United States.

The existing parole regulations, both for Mariel Cubans and other aliens stopped at the border, more than satisfy that standard. The regulations provide aliens with written notice of an upcoming parole determination, the opportunity to submit material orally or in writing, and the right to have the assistance of others. 8 C.F.R. 212.12(d)(4), 241.4(g)(5), (h)(1) and (2), and (i)(5) (as amended by 67 Fed. Reg. at 39,259). Consideration also is given to the alien's institutional progress, ties to the community, criminal and disciplinary records, psychological evaluations, and any other information that is probative of whether parole is in the public interest. 8 C.F.R. 212.12(b)(1) and (d), 241.4(f). If parole is denied, a written decision is provided. 8 C.F.R. 212.12(d)(4)(i) and (iii), 241.4(i)(5).

While the Secretary places the burden of proving the absence of a threat of violence or renewed criminal activity on the alien, that is especially appropriate here in light of the alien's already established record of criminality and parole revocation. "[A] criminal record accumulated by an [excluded] alien is a good indicator of future danger," and "[a]ny suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist." *Demore*, 538 U.S. at 526 n.9 (quoting *Zadvydas*, 533 U.S. at 714 (Kennedy, J., dissenting)).[24] Furthermore, at the border, the burden is on the alien to demonstrate a legal basis for admission; the government need not justify its decision to exclude or to detain the alien. See *Mezei*, 345 U.S. at 209, 216. There is no reason that the excluded alien's burden should be eased after he has taken advantage of the gift of parole to commit crimes in the United States and has been formally ordered removed.[25]

Petitioner and his amici (Pet. Br. 21-22; N.C. Justice Br. 14-15) decry what they perceive to be potentially indefinite detention. But nothing in the Constitution or federal law (or,

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[24] See also *Hendricks*, 521 U.S. at 358 ("[P]revious instances of violent behavior are an important indicator of future violent tendencies.") (quoting *Heller* v. *Doe*, 509 U.S. 312, 323 (1993)); *Jones* v. *United States*, 463 U.S. 354, 364 (1983) ("The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.").

[25] Amici's insistence (ABA Br. 21 n.15, 23-26; AILF Br. 15-20) that the alien must be shown to be a known risk by the same exacting standards required to detain citizens and other lawful residents once again fundamentally misconceives the status of an excluded alien. Heavy burdens of proof were appropriate in those cases because the detained individual possessed a preexisting "strong interest in liberty." *Salerno*, 481 U.S. at 750. Excluded aliens have no such pre-existing liberty interest, let alone a strong one, in release into American society.

for that matter, the international law invoked by amici, see Lawyers Comm. Br. 5-26) forbids the United States from indefinitely excluding a criminal alien from its territory, even for life. Exclusion, by its nature, "has no obvious termination point." *Zadvydas*, 533 U.S. at 697. That is all the detention here accomplishes. Detention therefore is, by definition, "for a period reasonably necessary to secure the alien's" exclusion. *Id.* at 682.

In any event, the parole regulations guarantee annual review of the detention decision. A denial of parole thus is not for life or even for the foreseeable future. Parole is denied only for one year—even less if changed circumstances warrant an earlier review. 8 C.F.R. 212.12(g)(2) and (3), 241.4(k)(2)(v) and (*l*)(3). Those annual reviews are meaningful, as petitioner's own impending release demonstrates. Indeed, since 1987, thousands of Mariel Cubans whose parole was revoked following a criminal conviction have been re-released on parole.

Finally, the government's ongoing diplomatic efforts to effectuate the return of excluded aliens diminish the prospect of indefinite detention. For example, the Department of Homeland Security reports that twenty aliens have already been returned to Cuba this year, and Lin Guo Xi, the alien whose supposedly indefinite detention prompted the Ninth Circuit to extend *Zadvydas* to excluded aliens in *Xi*, was recently removed to China. Removal efforts no doubt will take longer in some situations than others. But in those cases, responsibility for the alien's ongoing detention cannot fairly be laid on the United States Government alone, which has every right to exclude the alien from its territory. Responsibility more appropriately rests with the alien's country of origin, which is shirking its responsibilities to its own citizens and international law. Petitioner "is no more ours than theirs." *Mezei*, 345 U.S. at 216.

Significant responsibility also rests with the alien himself, who has thrown away the opportunities for uninterrupted parole or lawful residence generously offered by the United States, choosing instead to commit crimes and victimize the very community in which he now asserts a right to reside. Nothing in law or logic compels elevating the excluded criminal alien's interests over the safety and security of the community into which he would be released. Quite the opposite is true. This Court held in *Carlson* v. *Landon*, 342 U.S. 524 (1952), that detention does not violate the Due Process Clause "where there is reasonable apprehension of hurt from aliens," *id.* at 542.[26] And *Zadvydas* itself imposed no time limit on detention for aliens previously admitted for lawful permanent residence whose release following a formal order of removal has been revoked. To the contrary, the Court emphasized that release would be under "conditions that may not be violated." 533 U.S. at 696.[27]

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[26] See *Salerno*, 481 U.S. at 748 ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."); *Greenholtz*, 442 U.S. at 8 (parole decision should reflect "what is best both for the individual inmate and for the community").

[27] Petitioner goes even further. Not only does he contend that his asserted liberty interests justify endangering the safety of the community into which he will be released. He twice argues (Br. 20, 48) that the United States should exercise its "military options" and use military "force"—in other words, that the United States should imperil the lives of military service members and civilians and broadly complicate its international relations—rather than detain a small number of excluded recidivist criminal aliens who never had any right to be in this country in the first place and who have already proven themselves to be dangers to their communities. To state the argument is to refute it. Indeed, petitioner's confession (Br. 48) that vesting him with a right to be released will force the government to resort to new international diplomacy, "trade sanctions," and military force proves the government's point: decisions concerning the detention or release of excluded aliens whose continued

In sum, the specter of detention "until he is dead" that petitioner raises (Br. 22) is largely that: a specter. It has not materialized for petitioner, who once again is on the verge of release, nor has it happened for the overwhelming majority of excluded aliens. In those cases where detention is relatively prolonged, it still is only as long as is necessary to continue to effect the alien's physical exclusion from the United States or to ensure that he may be conditionally released into the community without undue risk. It is precisely when foreign governments prove most intransigent and when problems posed by excluded aliens prove most intractable that flexibility for the political Branches and deference by the judiciary is most imperative. In such situations, there are admittedly no good choices. But the longstanding sovereign right of self-determination through exclusion—and the constitutional assignment of immigration, foreign relations, and national security matters to Congress and the Executive Branch—vest both the authority and the responsibility for those hard choices in the political Branches. Cf. *Sale*, 509 U.S. at 163-166, 187-188. The response chosen by the political Branches to migration crises—preserving the historic national prerogative of exclusion, while permitting the Secretary to detain or parole excluded aliens as circumstances warrant—carefully balances humanitarianism, national security, and the domestic safety of the American public. When foreign governments deliberately send boatloads of aliens to the shores of the United States, and when such aliens use their humanitarian parole to commit crimes against Americans, the Secretary needs the flexibility to recalibrate that balance and give real-world effect to the political Branches' combined judgment that such criminal aliens should not be here in the first place. Rather than tie the government's hands, as petitioner proposes, humanitarian measures like parole can reasonably presuppose some mutuality of obligation.

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presence here is, by definition, a matter of diplomatic sensitivity (due to the other government's refusal or political inability to repatriate) must be left in the hands of the political Branches.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Constitution Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. 8 U.S.C. 1101(a)(13) provides:

(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

3. 8 U.S.C. 1182(d)(5) provides:

(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

4. 8 U.S.C. 1231(a) provides in pertinent part:

Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the

alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

5. 8 U.S.C. 1522(f) provides:

Assistance to States and counties for incarceration of certain Cuban nationals; priority for removal and return to Cuba

(1) The Attorney General shall pay compensation to States and to counties for costs incurred by the States and counties to confine in prisons, during the fiscal year for which such payment is made, nationals of Cuba who—

(A) were paroled into the United States in 1980 by the Attorney General,

(B) after such parole committed any violation of State or county law for which a term of imprisonment was imposed, and

(C) at the time of such parole and such violation were not aliens lawfully admitted to the United States—

(i) for permanent residence, or

(ii) under the terms of an immigrant or a non-immigrant visa issued,

under this chapter.

(2) For a State or county to be eligible to receive compensation under this subsection, the chief executive officer of the State or county shall submit to the Attorney General, in accordance with rules to be issued by the Attorney General, an application containing—

(A) the number and names of the Cuban nationals with respect to whom the State or county is entitled to such compensation, and

(B) such other information as the Attorney General may require.

(3) For a fiscal year the Attorney General shall pay the costs described in paragraph (1) to each State and county determined by the Attorney General to be eligible under paragraph (2); except that if the amounts appropriated for the fiscal year to carry out this subsection are insufficient to cover all such payments, each of such payments shall be ratably reduced so that the total of such payments equals the amounts so appropriated.

(4) The authority of the Attorney General to pay compensation under this subsection shall be effective for any fiscal year only to the extent and in such amounts as may be provided in advance in appropriation Acts.

(5) It shall be the policy of the United States Government that the President, in consultation with the Attorney General and all other appropriate Federal officials and all appropriate State and county officials referred to in paragraph (2), shall place top priority on seeking the expeditious removal from this country and the return to Cuba of Cuban nationals described in paragraph (1) by any reasonable and responsible means, and to this end the Attorney General may use the funds authorized to carry out this subsection to conduct such policy.

7. 8 C.F.R. 212.5 provides:

Parole of aliens into the United States.

(a) The authority of the Secretary to continue an alien in custody or grant parole under section 212(d)(5)(A) of the Act shall be exercised by the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing, subject to the parole and detention authority of the Secretary or his designees. The Secretary or his designees may invoke, in the exercise of discretion, the authority under section 212(d)(5)(A) of the Act.

(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(b) or (c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding:

(1) Aliens who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) Aliens who are defined as juveniles in § 236.3(a) of this chapter. The Director, Detention and Removal; directors of field operations; field office directors; deputy field office directors; or chief patrol agents shall follow the guidelines set forth in § 236.3(a) of this chapter and paragraphs

(b)(3)(i) through (iii) of this section in determining under what conditions a juvenile should be paroled from detention:

(i) Juveniles may be released to a relative (brother, sister, aunt, uncle, or grandparent) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that the juvenile has a relative who is in detention.

(ii) If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.

(iii) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a non-relative in detention who accompanied him or her on arrival, the question of releasing the minor and the accompanying non-relative adult shall be addressed on a case-by-case basis;

(4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or

(5) Aliens whose continued detention is not in the public interest as determined by those officials identified in paragraph (a) of this section.

(c) In the case of all other arriving aliens, except those detained under § 235.3(b) or (c) of this chapter and paragraph (b) of this section, those officials listed in paragraph (a) of this section may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate. An alien who arrives at a port-of-entry and applies for parole into the United States for the sole purpose of seeking adjustment of status under section 245A of the

Act, without benefit of advance authorization as described in paragraph (f) of this section shall be denied parole and detained for removal in accordance with the provisions of § 235.3(b) or (c) of this chapter. An alien seeking to enter the United States for the sole purpose of applying for adjustment of status under section 210 of the Act shall be denied parole and detained for removal under § 235.3(b) or (c) of this chapter, unless the alien has been recommended for approval of such application for adjustment by a consular officer at an Overseas Processing Office.

(d) *Conditions.* In any case where an alien is paroled under paragraph (b) or (c) of this section, those officials listed in paragraph (a) of this section may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. Those officials should apply reasonable discretion. The consideration of all relevant factors includes:

(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances or departure, and a bond may be required on Form I-352 in such amount as may be deemed appropriate;

(2) Community ties such as close relatives with known addresses; and

(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

(e) *Termination of parole*—(1) *Automatic.* Parole shall be automatically terminated without written notice (i) upon the departure from the United States of the alien, or, (ii) if not departed, at the expiration of the time for which parole was authorized, and in the latter case the alien shall be processed in accordance with paragraph (e)(2) of this section except that no written notice shall be required.

(2)(i) *On notice.* In cases not covered by paragraph (e)(1) of this section, upon accomplishment of the purpose for which parole was authorized or when in the opinion of one of the officials listed in paragraph (a) of this section, neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status that he or she had at the time of parole. When a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified. Any further inspection or hearing shall be conducted under section 235 or 240 of the Act and this chapter, or any order of exclusion, deportation, or removal previously entered shall be executed. If the exclusion, deportation, or removal order cannot be executed within a reasonable time, the alien shall again be released on parole unless in the opinion of the official listed in paragraph (a) of this section the public interest requires that the alien be continued in custody.

(ii) An alien who is granted parole into the United States after enactment of the Immigration Reform and Control Act of 1986 for other than the specific purpose of applying for adjustment of status under section 245A of the Act shall not be permitted to avail him or herself of the privilege of adjustment thereunder. Failure to abide by this provision through making such an application will subject the alien to termination of parole status and institution of proceedings under sections 235 and 236 of the Act without the written notice of termination required by § 212.5(e)(2)(i) of this chapter.

(f) *Advance authorization.* When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I-512.

(g) *Parole for certain Cuban nationals.* Notwithstanding any other provision respecting parole, the determination whether to release on parole, or to revoke the parole of, a native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980, shall be governed by the terms of § 212.12.

(h) *Effect of parole of Cuban and Haitian nationals.* (1) Except as provided in paragraph (h)(2) of this section, any national of Cuba or Haiti who was paroled into the United States on or after October 10, 1980, shall be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96-422, as amended (8 U.S.C. 1522 note).

(2) A national of Cuba or Haiti shall not be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96-422, as amended, if the individual was paroled into the United States:

(i) In the custody of a Federal, State or local law enforcement or prosecutorial authority, for purposes of criminal prosecution in the United States; or

(ii) Solely to testify as a witness in proceedings before a judicial, administrative, or legislative body in the United States.

8. 8 C.F.R. 212.12 provides:

Parole determinations and revocations respecting Mariel Cubans.

(a) *Scope.* This section applies to any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980 (hereinafter referred to as *Mariel Cuban*) and who is being detained by the Immigration and Naturalization Service (hereinafter referred to as the *Service*) pending his or her exclusion hearing, or pending his or her return to Cuba or to another country. It covers Mariel Cubans who have never been paroled as well as those Mariel Cubans whose previous parole has been revoked by the Service. It also applies to any Mariel Cuban, detained under the authority of the Immigration and Nationality Act in any facility, who has not been approved for release or who is currently awaiting movement to a Service or Bureau Of Prisons (BOP) facility. In addition, it covers the revocation of parole for those Mariel Cubans who have been released on parole at any time.

(b) *Parole authority and decision.* The authority to grant parole under section 212(d)(5) of the Act to a detained Mariel Cuban shall be exercised by the Commissioner, acting through the Associate Commissioner for Enforcement, as follows:

(1) *Parole decisions.* The Associate Commissioner for Enforcement may, in the exercise of discretion, grant parole to a detained Mariel Cuban for emergent reasons or for reasons deemed strictly in the public interest. A decision to retain in custody shall briefly set forth the reasons for the continued detention. A decision to release on parole may contain such special conditions as are considered appropriate. A copy of any decision to parole or to detain, with an attached copy translated into Spanish, shall be provided to

the detainee. Parole documentation for Mariel Cubans shall be issued by the district director having jurisdiction over the alien, in accordance with the parole determination made by the Associate Commissioner for Enforcement.

(2) *Additional delegation of authority.* All references to the Commissioner and Associate Commissioner for Enforcement in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Commissioner or Associate Commissioner for Enforcement to exercise powers under this section.

(c) *Review Plan Director.* The Associate Commissioner for Enforcement shall appoint a Director of the Cuban Review Plan. The Director shall have authority to establish and maintain appropriate files respecting each Mariel Cuban to be reviewed for possible parole, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(d) *Recommendations to the Associate Commissioner for Enforcement.* Parole recommendations for detained Mariel Cubans shall be developed in accordance with the following procedures.

(1) *Review Panels.* The Director shall designate a panel or panels to make parole recommendations to the Associate Commissioner for Enforcement. A Cuban Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by a two-member Panel shall be unanimous. If the vote of a two-member Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Panel member is added. A recommendation by a three-member Panel shall be by majority vote. The third member of any Panel shall be the Director of the Cuban Review Plan or his designee.

(2) *Criteria for Review.* Before making any recommendation that a detainee be granted parole, a majority of the Cuban Review Panel members, or the Director in case of a record review, must conclude that:

(i) The detainee is presently a nonviolent person;

(ii) The detainee is likely to remain nonviolent;

(iii) The detainee is not likely to pose a threat to the community following his release; and

(iv) The detainee is not likely to violate the conditions of his parole.

(3) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release on parole of a detainee:

(i) The nature and number of disciplinary infractions or incident reports received while in custody;

(ii) The detainee's past history of criminal behavior;

(iii) Any psychiatric and psychological reports pertaining to the detainee's mental health;

(iv) Institutional progress relating to participation in work, educational and vocational programs;

(v) His ties to the United States, such as the number of close relatives residing lawfully here;

(vi) The likelihood that he may abscond, such as from any sponsorship program; and

(vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole.

(4) *Procedure for review.* The following procedures will govern the review process:

(i) Record review. Initially, the Director or a Panel shall review the detainee's file. Upon completion of this record review, the Director or the Panel shall issue a written recommendation that the detainee be released on parole or scheduled for a personal interview.

(ii) Personal interview. If a recommendation to grant parole after only a record review is not accepted or if the detainee is not recommended for release, a Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the Director. The detainee may be accompanied during the interview by a person of his choice, who is able to attend at the time of the scheduled interview, to assist in answering any questions. The detainee may submit to the Panel any information, either orally or in writing, which he believes presents a basis for release on parole.

(iii) Panel recommendation. Following completion of the interview and its deliberations, the Panel shall issue a written recommendation that the detainee be released on parole or remain in custody pending deportation or pending further observation and subsequent review. This written recommendation shall include a brief statement of the factors which the Panel deems material to its recommendation. The recommendation and appropriate file material shall be forwarded to the Associate Commissioner for Enforcement, to be considered in the exercise of discretion pursuant to § 212.12(b).

(e) *Withdrawal of parole approval.* The Associate Commissioner for Enforcement may, in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, or

any other circumstance, indicates that parole would no longer be appropriate.

(f) *Sponsorship.* No detainee may be released on parole until suitable sponsorship or placement has been found for the detainee. The paroled detainee must abide by the parole conditions specified by the Service in relation to his sponsorship or placement. The following sponsorships and placements are suitable:

(1) Placement by the Public Health Service in an approved halfway house or mental health project;

(2) Placement by the Community Relations Service in an approved halfway house or community project; and

(3) Placement with a close relative such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States.

(g) *Timing of reviews.* The timing of review shall be in accordance with the following guidelines.

(1) *Parole revocation cases.* The Director shall schedule the review process in the case of a new or returning detainee whose previous immigration parole has been revoked. The review process will commence with a scheduling of a file review, which will ordinarily be expected to occur within approximately three months after parole is revoked. In the case of a Mariel Cuban who is in the custody of the Service, the Cuban Review Plan Director may, in his or her discretion, suspend or postpone the parole review process if such detainee's prompt deportation is practicable and proper.

(2) *Continued detention cases.* A subsequent review shall be commenced for any detainee within one year of a refusal to grant parole under § 212.12(b), unless a shorter interval is specified by the Director.

(3) *Discretionary reviews.* The Cuban Review Plan Director, in his discretion, may schedule a review of a detainee at any time when the Director deems such a review to be warranted.

(h) *Revocation of parole.* The Associate Commissioner for Enforcement shall have authority, in the exercise of discretion, to revoke parole in respect to Mariel Cubans. A district director may also revoke parole when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Associate Commissioner. Parole may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(1) The purposes of parole have been served;

(2) The Mariel Cuban violates any condition of parole;

(3) It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or

(4) The period of parole has expired without being renewed.

9. 8 C.F.R. 241.4 provides:

Continued detention of inadmissible, criminal, and other aliens beyond the removal period.

(a) *Scope.* The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or his or her designee, the Executive Associate Commissioner for Field Operations (Executive Associate Commissioner), the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Detention and Removal Field Office or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided for in paragraph (b)(2) of this section, the provisions of this section apply to the custody determinations for the following group of aliens:

(1) An alien ordered removed who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978, 5048 (codified at 8 U.S.C. 1226(e)(1) through (e)(3)(1994));

(2) An alien ordered removed who is removable under section 237(a)(1)(C) of the Act;

(3) An alien ordered removed who is removable under sections 237(a)(2) or 237(a)(4) of the Act, including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Public Law 104-208, 110 Stat. 3009-546; and

(4) An alien ordered removed who the decision-maker determines is unlikely to comply with the removal order or is a risk to the community.

(b) *Applicability to particular aliens*—(1) *Motions to reopen.* An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) *Parole for certain Cuban nationals.* The review procedures in this section do not apply to any inadmissible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(3) *Individuals granted withholding or deferral of removal.* Aliens granted withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture who are otherwise subject to detention are subject to the provisions of this part 241. Individuals subject to a termination of deferral hearing under 8 CFR 208.17(d) remain subject to the provisions of this part 241 throughout the termination process.

(4) *Service determination under 8 CFR 241.13.* The custody review procedures in this section do not apply after

the Service has made a determination, pursuant to the procedures provided in 8 CFR 241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

(c) *Delegation of authority.* The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act when there is a final order of removal is delegated as follows:

(1) *District Directors and Directors of Detention and Removal Field Offices.* The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the 3 month period immediately following the expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director or the Director of the Detention and Removal Field Office having jurisdiction over the alien. The district director or the Director of the Detention and Removal Field Office shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective jurisdictional area.

(2) *Headquarters Post-Order Detention Unit (HQPDU).* For any alien the district director refers for further review after the removal period, or any alien who has not been released or removed by the expiration of the three-month

period after the review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) *The HQPDU review plan.* The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) *Additional delegation of authority.* All references to the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, and the district director in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, or the district director to exercise powers under this section.

(d) *Custody determinations.* A copy of any decision by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from the district director's, Director of the Detention and Removal Field Office's or the Executive Associate Commissioner's decision.

(1) *Showing by the alien.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may release an alien if the alien

demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section, continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) *Service of decision and other documents.* All notices, decisions, or other documents in connection with the custody reviews conducted under this section by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall be served on the alien, in accordance with 8 CFR 103.5a, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director, Director of the Detention and Removal Field Office, or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) *Alien's representative.* The alien's representative is required to complete Form G-28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) *Criteria for release.* Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

(f) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to—

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) *Travel documents and docket control for aliens continued in detention*—(1) *Removal period.* (i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:

(A) The date the order becomes administratively final;

(B) If the removal order is subject to judicial review (including review by habeas corpus) and if the court has ordered a stay of the alien's removal, the date on which,

consistent with the court's order, the removal order can be executed and the alien removed; or

(C) If the alien was detained or confined, except in connection with a proceeding under this chapter relating to removability, the date the alien is released from the detention or confinement.

(ii) The removal period shall run for a period of 90 days. However, the removal period is extended under section 241(a)(1)(C) of the Act if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal. The Service will provide such an alien with a Notice of Failure to Comply, as provided in paragraph (g)(5) of this section, before the expiration of the removal period. The removal period shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effect the alien's removal.

(2) *In general.* The district director shall continue to undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel document is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(3) *Availability of travel document.* In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

(4) *Removal.* The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(5) *Alien's compliance and cooperation.* (i) Release will be denied and the alien may remain in detention if the alien fails or refuses to make timely application in good faith for travel documents necessary to the alien's departure or conspires or acts to prevent the alien's removal. The detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens.

(ii) The Service shall serve the alien with a Notice of Failure to Comply, which shall advise the alien of the following: the provisions of sections 241(a)(1)(C) (extension of removal period) and 243(a) of the Act (criminal penalties related to removal); the circumstances demonstrating his or her failure to comply with the requirements of section 241(a)(1)(C) of the Act; and an explanation of the necessary steps that the alien must take in order to comply with the statutory requirements.

(iii) The Service shall advise the alien that the Notice of Failure to Comply shall have the effect of extending the removal period as provided by law, if the removal period has not yet expired, and that the Service is not obligated to complete its scheduled custody reviews under this section

until the alien has demonstrated compliance with the statutory obligations.

(iv) The fact that the Service does not provide a Notice of Failure to Comply, within the 90-day removal period, to an alien who has failed to comply with the requirements of section 241(a)(1)(C) of the Act, shall not have the effect of excusing the alien's conduct.

(h) *District director's or Director of the Detention and Removal Field Office's custody review procedures.* The district director's or Director of the Detention and Removal Field Office's custody determination will be developed in accordance with the following procedures:

(1) *Records review.* The district director or Director of the Detention and Removal Field Office will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director or Director of the Detention and Removal Field Office will conduct a records review prior to the expiration of the removal period. This initial post-order custody review will consist of a review of the alien's records and any written information submitted in English to the district director or Director of the Detention and Removal Field Office by or on behalf of the alien. However, the district director or Director of the Detention and Removal Field Office may in his or her discretion schedule a personal or telephonic interview with the alien as part of this custody determination. The district director or Director of the Detention and Removal Field Office may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) *Notice to alien.* The district director or Director of the Detention and Removal Field Office will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit

information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's or Director of the Detention and Removal Field Office's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director or Director of the Detention and Removal Field Office expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) *Factors for consideration.* The district director's or Director of the Detention and Removal Field Office's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director or Director of the Detention and Removal Field Office must be able to reach the conclusions set forth in paragraph (e) of this section.

(4) *District director's or Director of the Detention and Removal Field Office's decision.* The district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(5) *District office or Detention and Removal Field office staff.* The district director or the Director of the Detention and Removal Field Office may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decisions to those persons directly responsible for detention within his or her geographical

areas of responsibility. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, the assistant director of the detention and removal field office, the director of the detention and removal resident office, the assistant director of the detention and removal resident office, officers in charge of service processing centers, or such other persons as the district director or the Director of the Detention and Removal Field Office may designate from the professional staff of the Service.

(i) *Determinations by the Executive Associate Commissioner.* Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

(1) *Review panels.* The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by the two-member Review Panel shall be unanimous. If the vote of the two-member Review Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) *Records review.* Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) *Personal interview.* (i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

(4) *Alien's participation.* Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this section.

(5) *Panel recommendation.* Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) *Determination.* The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors

described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(7) *No significant likelihood o[f] removal.* During the custody review process as provided in this paragraph (i), or at the conclusion of that review, if the alien submits, or the record contains, information providing a substantial reason to believe that the removal of a detained alien is not significantly likely in the reasonably foreseeable future, the HQPDU shall treat that as a request for review and initiate the review procedures under § 241.13. To the extent relevant, the HQPDU may consider any information developed during the custody review process under this section in connection with the determinations to be made by the Service under § 241.13. The Service shall complete the custody review under this section unless the HQPDU is able to make a prompt determination to release the alien under an order of supervision under § 241.13 because there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.

(j) *Conditions of release*—(1) *In general.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) *Sponsorship.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, condition

release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship, housing, or other placement has been found for the detainee, if ordered, including but not limited to, evidence of financial support.

(3) *Employment authorization.* The district director, Director of the Detention and Removal Field Office, and the Executive Associate Commissioner, may, in the exercise of discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, withdraw approval for release of any detained alien prior to release when, in the decision-maker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) *Timing of reviews.* The timing of reviews shall be in accordance with the following guidelines:

(1) *District director or Director of the Detention and Removal Field Office.* (i) Prior to the expiration of the removal period, the district director or Director of the Detention and Removal Field Office shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished during the period because no country currently will accept the alien, or removal of the alien prior

to expiration of the removal period is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(ii) When release is denied pending the alien's removal, the district director or Director of the Detention and Removal Field Office in his or her discretion may retain responsibility for custody determinations for up to three months after expiration of the removal period, during which time the district director or Director of the Detention and Removal Field Office may conduct such additional review of the case as he or she deems appropriate. The district director or Director of the Detention and Removal Field Office may release the alien if he or she is not removed within the three-month period following the expiration of the removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director or Director of the Detention and Removal Field Office may refer the alien to the HQPDU for further custody review.

(2) *HQPDU reviews*—(i) *District director or Director of the Detention and Removal Field Office referral for further review.* When the district director or Director of the Detention and Removal Field Office refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by the expiration of the removal period or as soon thereafter as practicable.

(ii) *District director or Director of the Detention and Removal Field Office retains jurisdiction.* When the district director or Director of the Detention and Removal Field Office has advised the alien at the 90-day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending removal or further custody review, and the alien is not removed within three months of the district director's or Director of the Detention and Removal Field Office's decision, authority over the custody determination transfers from the district director or Director of the Detention and Removal Field Office to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) *Continued detention cases.* A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) *Review scheduling.* Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) *Discretionary reviews.* The HQPDU Director, in his or her discretion, may schedule a review of a detainee at

shorter intervals when he or she deems such review to be warranted.

(3) *Postponement of review.* In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt removal is practicable and proper, or for other good cause. The decision and reasons for the delay shall be documented in the alien's custody review file or A file, as appropriate. Reasonable care will be exercised to ensure that the alien's case is reviewed once the reason for delay is remedied or if the alien is not removed from the United States as anticipated at the time review was suspended or postponed.

(4) *Transition provisions.* (i) The provisions of this section apply to cases that have already received the 90-day review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable*, February 3, 1999; *Supplemental Detention Procedures*, April 30, 1999; *Interim Changes and Instructions for Conduct of Post-order Custody Reviews*, August 6, 1999; *Review of Long-term Detainees*, October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at http:// www.ins.usdoj.gov). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms

the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

(l) *Revocation of release*—(1) *Violation of conditions of release.* Any alien described in paragraph (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

(2) *Determination by the Service.* The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

(3) *Timing of review when release is revoked.* If the alien is not released from custody following the informal interview provided for in paragraph (l)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.

10. 8 C.F.R. 241.5 provides:

Conditions of release after removal period.

(a) *Order of supervision.* An alien released pursuant to § 241.4 shall be released pursuant to an order of supervision. The Commissioner, Deputy Commissioner, Executive Associate Commissioner Field Operations, regional director, district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer-in-charge may issue Form I-220B, Order of Supervision. The order shall specify conditions of supervision including, but not limited to, the following:

(1) A requirement that the alien report to a specified officer periodically and provide relevant information under oath as directed;

(2) A requirement that the alien continue efforts to obtain a travel document and assist the Service in obtaining a travel document;

(3) A requirement that the alien report as directed for a mental or physical examination or examinations as directed by the Service;

(4) A requirement that the alien obtain advance approval of travel beyond previously specified times and distances;

(5) A requirement that the alien provide the Service with written notice of any change of address on Form AR-11 within ten days of the change.

(b) *Posting of bond.* An officer authorized to issue an order of supervision may require the posting of a bond in an amount determined by the officer to be sufficient to ensure compliance with the conditions of the order, including surrender for removal.

(c) *Employment authorization.* An officer authorized to issue an order of supervision may, in his or her discretion, grant employment authorization to an alien released under an order of supervision if the officer specifically finds that:

(1) The alien cannot be removed because no country will accept the alien; or

(2) The removal of the alien is impracticable or contrary to public interest.

(13)

No. 03-7434

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DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, Interim Field Office Director, Miami, Bureau of Immigration and Customs Enforcement,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT IN REPLY 1

I. THE GOVERNMENT HAS FAILED TO MEET MR. BENITEZ'S STATUTORY ARGUMENTS... 1

A. The Meaning of § 1231(a)(6) Does Not Depend on the Class of Persons to Which It Is Applied 1

1. The Due Process Clause Is in No Way Analogous to § 1231(a)(6)..... 2

2. No Case Has Ever Held That a Statute Can Be Interpreted One Way When Necessary to Avoid a Constitutional Problem and Another Way When the Constitutional Problem Is Not Present.... 3

3. This Court's Opinion in *Rasul v. Bush* Provides Further Support for Mr. Benitez's Position 6

B. The Question in This Case Is Not Whether § 1231(a)(6) Grants a Right to Release; the Question Is Whether It Justifies Mr. Benitez's Detention..... 7

C. The Government's Parole Authority Under 8 U.S.C. § 1182(d)(5)(A) Does Not Justify Its Detention of Mr. Benitez 8

1. The Government Is Bound By Its Answer to Mr. Benitez's Habeas Petition..... 9

2. The Government's Parole Authority Does Not Justify Detention of an Alien Subject to an Order of Removal 10

TABLE OF CONTENTS – Continued

Page

D. Section 1231(a)(6) Is Not Limited to "Criminal Aliens" and Does Not Require Any Determination That an Alien Be Dangerous Before He Can Be Detained 11

II. THE GOVERNMENT HAS ALSO FAILED TO MEET MR. BENITEZ'S CONSTITUTIONAL ARGUMENTS 14

A. The Government's Arguments Depend on Circumstances Not Present in Mr. Benitez's Case 14

B. The Government's Position Does Not Recognize the Proper Role of the Judiciary Under the Facts of This Case 15

1. The Courts' Proper Role Is To Determine the Constitutional Consequences of the Political Branches' Decision to Invite and Welcome the Mariels Into Our Society 15

2. The Government's "Just Trust Us" Procedural Due Process Arguments Ignore the Role of the Judiciary 16

3. The Government Fails to Appreciate the Difference Between a Hostile Nation and a Human Being Born in a Hostile Nation 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602 (1993) 17

Crowell v. Benson, 285 U.S. 22 (1932) 3, 4, 5

Demarest v. Manspeaker, 498 U.S. 184 (1991) 9

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) 17

Johnson v. Eisentrager, 339 U.S. 763 (1950) 6

Lane v. Pena, 518 U.S. 187 (1996) 3, 5, 6

Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) 10

Mathews v. Eldridge, 424 U.S. 319 (1976) 2

Ngo v. INS, 192 F.3d 390 (3d Cir. 1999) 18

Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash. 1999) 18

Rasul v. Bush, 124 S. Ct. 2686 (2004) 6

Reno v. Flores, 507 U.S. 292 (1993) 3

Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) 7, 20

Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) 19

St. John v. McElroy, 917 F. Supp. 243 (S.D.N.Y. 1996) 18

United States v. Robel, 389 U.S. 258 (1967) 20

Wales v. Whitney, 114 U.S. 564 (1885) 7

Ward v. Monroeville, 409 U.S. 57 (1972) 17

Zadvydas v. Davis, 533 U.S. 678 (2001) 1, 11, 12, 13, 14

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 2

U.S. Const. amend. XIV 19

STATUTES

Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U.S.C. §§ 901-950 4

Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. §§ 791 *et seq.* 5

USA PATRIOT Act, Pub. L. 107, 115 Stat. 305 (2001) 12

8 U.S.C. § 1182(a)(3)(A)(i) 13

8 U.S.C. § 1182(a)(3)(A)(iii) 13

8 U.S.C. § 1182(a)(3)(B) 13

8 U.S.C. § 1182(d)(5)(A) 8, 9, 10, 14

8 U.S.C. § 1226a 12, 13

8 U.S.C. § 1226a(a)(1) 13

8 U.S.C. § 1226a(a)(6) 13

8 U.S.C. § 1226a(a)(3)(A) 13

8 U.S.C. § 1231(a) 8

8 U.S.C. § 1231(a)(3) 10, 16

8 U.S.C. § 1231(a)(6) ..... *passim*

8 U.S.C. § 1252(a)(1) 3

8 U.S.C. § 1537(b)(2)(C) 13

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 2241 ..... 6, 7

29 U.S.C. § 794(a) 5

29 U.S.C. § 794a(a)(2) 5, 6

33 U.S.C. § 919(a) 4

33 U.S.C. § 921(b) 4

REGULATIONS

8 C.F.R. § 100.2(c)(2) (2003) 17

8 C.F.R. § 212.12(b) (2003) 17

8 C.F.R. § 241.13(3)(i) (2003) 19

8 C.F.R. § 242.24 (1992) 3

53 Fed. Reg. 17,449 (1988) 3

66 Fed. Reg. 56,967 (2001) 13

ARGUMENT IN REPLY

Contrary to the "Question Presented" framed by the Government and the structure of the Government's brief, there are two independent questions presented for this Court. Can 8 U.S.C. § 1231(a)(6) be interpreted to authorize indefinite detention of one class of aliens, but not another? If so, would the indefinite detention of an alien in Mr. Benitez's position raise a serious constitutional question? If this Court answers either question in the negative, then Mr. Benitez is entitled to prevail. Thus, the issues must be examined independently.

I. THE GOVERNMENT HAS FAILED TO MEET MR. BENITEZ'S STATUTORY ARGUMENTS.

The Government fails to meet and overcome Mr. Benitez's statutory arguments in two separate ways. First, as developed in Part A below, the Government misconstrues this Court's precedent. Second, as developed in Parts B, C, and D, it loses sight of the statutory language at issue.

A. The Meaning of § 1231(a)(6) Does Not Depend on the Class of Persons to Which It Is Applied.

The Government does not contest the basic proposition in this case that the language of § 1231(a)(6) does not suggest that it might mean one thing for one class of aliens (*e.g.*, aliens who had originally been admitted for permanent residence like those at issue in *Zadvydas v. Davis*, 533 U.S. 678 (2001)), but an entirely different thing for another class (*e.g.*, aliens who had been admitted under immigration parole, like Mr. Benitez). Instead, it suggests that case law authorizes a court employing the doctrine of constitutional avoidance to interpret the same language one way for one class of persons and a different way for another class. (Resp. Br. at 28-29.) The Government relies first on this Court's decisions interpreting the Due Process

Clause and then on three decisions interpreting statutes. Neither line of cases supports the Government's assertion. Finally, one of this Court's recent opinions regarding detention in Guantanamo Bay provides further support for Mr. Benitez.

1. The Due Process Clause Is in No Way Analogous to § 1231(a)(6).

First, the Government attempts to compare § 1231(a)(6) to the Due Process Clause of the Fifth Amendment. (Resp. Br. at 28.) This is a false comparison. As an initial matter, the Due Process Clause is, of course, not a statute that has been interpreted by the courts under the constitutional avoidance doctrine. It therefore has no application to the first question presented in this case.

Moreover, that constitutional provision provides a general guarantee against governmental intrusion on individual rights. By its very nature, it has to be interpreted in any given case based on all of the surrounding circumstances, including the specific private interests unique to the individual or class of persons at issue. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[This Court's due process] decisions underscore the truism that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands." (citations, internal quote marks, and alterations omitted)). On the other hand, § 1231(a)(6) is a statute that applies to specifically delineated groups of aliens. By identifying the various classes of aliens to which it applies without distinguishing among them in its application, the statute itself suggests uniform treatment.

2. No Case Has Ever Held That a Statute Can Be Interpreted One Way When Necessary to Avoid a Constitutional Problem and Another Way When the Constitutional Problem Is Not Present.

Next, the Government asserts that this Court's decisions in *Reno v. Flores*, 507 U.S. 292 (1993), *Crowell v. Benson*, 285 U.S. 22 (1932), and *Lane v. Pena*, 518 U.S. 187 (1996), "construed the same words of a statute one way for constitutional reasons and another way when those same constitutional constraints do not apply." (Resp. Br. at 28-29 & n.16.) The Government is mistaken on all three counts.

While *Flores* did involve an immigration statute providing for discretionary detention, specifically 8 U.S.C. § 1252(a)(1) (1988), its similarity to this case ends there. Nowhere in that opinion did the Court purport to interpret § 1252(a)(1) at all, much less interpret it differently for juvenile aliens than for adult aliens, as the Government implies. Instead, *Flores* involved a facial constitutional challenge by a juvenile alien of an INS regulation, 53 Fed. Reg. 17,449, 17,450-51 (1988) (codified at 8 C.F.R. § 242.24 (1992)), that provided that juveniles could only be released to the custody of a parent, close relative, or legal guardian. *Flores*, 507 U.S. at 300. The Court simply held that this regulation did not violate substantive due process. *Id.* at 300-15. In short, *Flores* has no bearing on the issue of statutory interpretation presented in this case.[1]

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[1] Mr. Benitez does not "agree that Section 1231(a)(6)'s presumptive cap on the detention of resident aliens would tolerate the lengthier detention of a juvenile if there were no appropriate sponsor." (Resp. Br. at 29.) Other justifications, however, might prevent the Government from releasing a child. *See Flores*, 507 U.S. at 302 ("[W]here the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so.").

In *Crowell*, this Court considered the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U.S.C. §§ 901-950, which governed claims by certain maritime employees injured while working on navigable waters. 285 U.S. at 36-37. As is relevant here, the Court considered two statutory provisions regarding the relative authority of the Deputy Commissioner of the United States Employees' Compensation Commission and the courts to determine claims under the act. The first provision, 33 U.S.C. § 919(a) (1932), gave the deputy commissioner "full authority to hear and determine all questions in respect of such claim." 285 U.S. at 42, 62. The second provision, 33 U.S.C. § 921(b) (1932), authorized the federal courts to set aside a compensation order by the deputy commissioner if the order is "not in accordance with law." *Id.* at 44-45, 62.

Before engaging in its interpretive analysis, the Court concluded that Congress could delegate the authority to make a final determination of certain historical facts – such as "the circumstances, nature, extent, and consequences of the injuries sustained by the employee" to the deputy commissioner. *Id.* at 50-54. On the other hand, the Court noted that "jurisdictional facts" necessary to give rise to the law applied generally must be subject to review by the courts. *Id.* at 54-61. The Court noted that in the context of maritime-worker injuries, the jurisdictional facts were the "locality of the injury and the existence of the relation of master and servant." *Id.* at 62. Thus, if the Court were to interpret § 919(a) to give the deputy commissioner final authority to determine these facts without judicial review, then it would be unconstitutional.

Applying the constitutional avoidance doctrine, the Court concluded that the term "such claim" in § 919(a) referred to the claim for injury and presupposed that the claimant was an employee and the injury occurred on navigable waters. *Id.* It noted that the "fact of employment is an essential condition precedent to the right to make the claim." *Id.* Because nothing in the act specifically provided

that the deputy commissioner's finding of the jurisdictional facts of employment and location was meant to be final, the Court concluded that the judicial authority to set aside a compensation order that is "not in accordance with law" authorized the courts to review the employment and location decisions. *Id.*

Contrary to the Government's argument, nothing in the Court's reasoning or holding suggested that the same words in the statute could be interpreted differently depending on the context. In all contexts, the language giving the deputy commissioner authority to determine "all questions in respect to such claim" did not prevent the courts from reviewing determinations of legal questions and jurisdictional facts in determining whether an award was "in accordance with the law." There is no hint that the statute might mean one thing for one person, and the opposite for another. Thus, *Crowell* has no application to this case.

Lane is similarly inapposite. In that case, this Court was called upon to determine whether the Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. §§ 791 *et seq.*, waived the federal government's sovereign immunity to authorize a claimant to sue the government for a violation of the act. 518 U.S. at 189. The Court began by noting that Section 504(a) of that act (codified at 29 U.S.C. § 794(a) (1994)) prohibited discrimination on the basis of disability "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency." *Id.* Section 505(a)(2) of the act (codified at 29 U.S.C. § 794a(a)(2) (1994)) provided that an action for money damages "shall be available to any person aggrieved by an act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under [section 504]." *Id.*

After emphasizing the well established rule that a waiver of federal sovereign immunity "must be unequivocally expressed in statutory text," *id.* at 192, the Court held that section 505(a)(2) did not clearly waive sovereign

immunity except with regard to a federal agency that discriminated in the course of providing financial assistance. *Id.* at 192-93. In other words, although all federal agencies were prohibited by section 504(a) from discriminating in "any program or activity" that they conducted, they retained their sovereign immunity against monetary damages awards for that violation unless it involved the provision of federal financial assistance. *See id.* at 196 ("It is plain that Congress is free to waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary damages awards.").

Not only did *Lane* not involve application of the constitutional avoidance doctrine, it also does not suggest that any statutory language might mean one thing in one context and the opposite in another context. In short, it has no application to this case.

3. This Court's Opinion in *Rasul v. Bush* Provides Further Support for Mr. Benitez's Position.

After the Government filed its brief, this Court held that the federal habeas statute, 28 U.S.C. § 2241 (2003), authorizes an alien detained in Guantanamo Bay, Cuba, to bring a habeas petition in federal court. *Rasul v. Bush*, 124 S. Ct. 2686 (2004). In that case, the Government conceded that § 2241 would authorize an American citizen held at Guantanamo Bay to seek habeas relief, but contended that the same statute could not be used by an alien. 124 S. Ct. at 2696. Although the Court suggested that the petitioners in *Rasul* (foreign nationals alleged to be enemy combatants seized on the battlefield in Afghanistan) may have lacked any constitutional right to habeas relief, *see id.* at 2693-94 (analyzing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)), it rejected the Government's suggestion that § 2241 therefore should be interpreted not to authorize habeas relief:

> Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

Id. at 2696.

The Government makes the same argument in this case, and this Court should again reject it. Just as 28 U.S.C. § 2241 draws no distinction between citizens and aliens, 8 U.S.C. § 1231(a)(6) draws no distinction in its application between classes of aliens.

B. The Question in This Case Is Not Whether § 1231(a)(6) Grants a Right to Release; the Question Is Whether It Justifies Mr. Benitez's Detention.

Throughout its brief, the Government repeatedly characterizes Mr. Benitez's position as an argument that § 1231(a)(6) grants him a right to be released from detention. (*E.g.*, Resp. Br. at 12 ("Petitioner claims a statutory and constitutional right to be paroled. . . ."), 13 ("[H]e insists he has a right to release. . . ."), 32 (arguing that the Court should not interpret § 1231(a)(6) to create a "right to parole").) Mr. Benitez argues no such thing, and the Government's insistence on rephrasing the issue demonstrates a misunderstanding of the nature of habeas proceedings.

A habeas petition initiates a "proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated *if no sufficient reason is shown to the contrary.*" *Wales v. Whitney*, 114 U.S. 564, 574 (1885) (emphasis added), *quoted with approval in Rumsfeld v. Padilla*, 124 S. Ct. 2711,

2717 (2004). In other words, once the petitioner shows that he is being detained, the detaining official bears the burden of explaining to the court the legal justification for the detention. Thus, Mr. Benitez has never sought to enforce any purported right under § 1231(a)(6). He simply filed a petition for a writ of habeas corpus claiming that the Government was holding him without legal authority. (J.A. 3-26.) After the district court determined that Mr. Benitez's petition was sufficient on its face, it ordered the Government to answer. (J.A. 1.) In its answer, the Government attempted to satisfy its burden to justify Mr. Benitez's continued detention by relying solely on § 1231(a):

> The relevant detention provision governing the petitioner's detention is section 241(a) of the INA, 8 U.S.C. § 1231(a), which covers detention following entry of a final order of removal.

(J.A. 31.)

Thus, it is the Government that is arguing that § 1231(a)(6) gives *it* a substantive right – the right to indefinitely detain Mr. Benitez. The overarching question, therefore, is whether § 1231(a)(6) authorizes Mr. Benitez's continued detention, not whether it gives him any right to release.

C. The Government's Parole Authority Under 8 U.S.C. § 1182(d)(5)(A) Does Not Justify Its Detention of Mr. Benitez.

In its brief, the Government announces a new justification for its detention of Mr. Benitez apart from § 1231(a)(6). Specifically, the Government points to 8 U.S.C. § 1182(d)(5)(A) (2003), which authorizes the Attorney General, under limited circumstances, to parole an alien seeking initial admission to the United States and to later revoke that parole when those circumstances no

longer apply.[2] (Resp. Br. at 25-26.) The Government suggests that it has simply revoked Mr. Benitez's parole and that it is detaining him pursuant to this provision. This argument is both procedurally waived and wrong on the merits.

1. The Government Is Bound By Its Answer to Mr. Benitez's Habeas Petition.

As noted in Part I(B), *supra*, the Government responded to Mr. Benitez's habeas petition by stating that it was detaining Mr. Benitez pursuant to 8 U.S.C. § 1231(a)(6). (J.A. 31.) Nowhere did it suggest to the district court that it was actually detaining Mr. Benitez pursuant to its general parole authority under § 1182(d)(5)(A). The Government cannot raise a new issue like this for the first time in this Court where it was not preserved below. *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991). The Government made a similar attempt in the Eleventh Circuit to provide an alternative basis for its detention of Mr. Benitez by arguing that he was being detained pursuant to pre-IIRIRA provisions, but the

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[2] The full text of this provision is as follows:

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A).

Eleventh Circuit properly held that argument to have been waived. (J.A. 67 n.13.)

Moreover, the questions presented in Mr. Benitez's petition for a writ of certiorari were limited to the authority of the Government to detain Mr. Benitez under § 1231(a)(6).[3] This Court's Rule 14.1(a) clearly states, "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." *See also Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990) (enforcing this rule to preclude a respondent from injecting a new justification for the decision below).

2. The Government's Parole Authority Does Not Justify Detention of an Alien Subject to an Order of Removal.

Even if this Court were inclined to consider an alternative statutory basis for Mr. Benitez's detention that was not raised below, § 1182(d)(5)(A) no longer has any application to Mr. Benitez. By its terms, § 1182(d)(5)(A) applies only to "any alien applying for admission to the United States." By the time the Government took Mr. Benitez into custody, he was subject to a final order of removal that he did not contest. Under no view could he be considered an alien applying for admission. The Government's authority to detain an alien subject to a final removal order is governed by § 1231.[4]

[3] The Government's response to the petition also couched its version of the questions presented solely in terms of § 1231(a)(6).

[4] As the Government itself explained in its answer to the habeas petition, § 1231(a)(6) is the statute that "covers detention following entry of a final order of removal." (J.A. 31.)

D. Section 1231(a)(6) Is Not Limited to "Criminal Aliens" and Does Not Require Any Determination That an Alien Be Dangerous Before He Can Be Detained.

Throughout its brief, the Government discusses § 1231(a)(6) as if it only applied to "criminal aliens"[5] who have been determined to be dangerous.[6] While dangerous, criminal aliens might make the easiest target for the Government's policy arguments, § 1231(a)(6) applies to a whole host of aliens who are neither criminals nor dangerous. As more fully documented in Mr. Benitez's initial brief, the statute applies to aliens who are inadmissible because they have committed such sins as being poor, seeking certain jobs, allowing their visas to expire, or being physically helpless due to sickness or infancy. (Pet. Br. at 47.) *See also Zadvydas*, 533 U.S. at 691 ("The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations.")

Thus, if the Court accepts the Government's arguments, then it necessarily will be interpreting § 1231(a)(6) to authorize the Government to give a life sentence to an alien who is inadmissible because he is poor or sick, but

[5] *E.g.*, Resp. Br. at (I) (phrasing question presented as only applying to "continued detention of a criminal alien"), 14 (providing heading for entire argument that § 1231(a)(6) permits indefinite detention of "criminal aliens who have not been admitted" and characterizing § 1231(a)(6) as "Congress's express authorization for the Executive Branch to *detain* excluded criminal aliens")).

[6] *E.g.*, Resp. Br. at 13 (asserting that Mr. Benitez "insists he has a right to be released, notwithstanding any express determination by the government that he poses a risk to the public"), 22 (claiming that Mr. Benitez's interpretation of § 1231(a)(6) would "restrict the government's ability to prevent dangerous aliens from circulating through American society").

only hold a violent criminal for six months just because he had once been lawfully admitted for permanent residence. The text of § 1231(a)(6) thankfully does not permit such an absurd result. If Congress wishes to authorize indefinite detention for criminal aliens subject to a removal order who are determined to be dangerous, it is free to do so. Only then will the Court have to reach the constitutionality of this very different principle.

The Government insists that "this case and the others pending before the Court are not about paroled aliens who established stable and law-abiding lives in the United States." (Resp. Br. at 24.) Again, the Government misses the point. This case *is* about the proper interpretation of a statute that applies equally to "dangerous, criminal aliens" and "stable and law-abiding" aliens. Mr. Benitez does not contend that § 1231(a)(6) is unconstitutional either on its face or as applied to him. He merely contends that it must not be interpreted to permit indefinite detention.

The premise of the Government's distinction between criminal and law-abiding aliens appears to be that § 1231(a)(6) would not permit the indefinite detention of other inadmissible aliens subject to a removal order, so long as they are law-abiding. What is the basis for this presumption? The Government appears to be suggesting either that those inadmissible aliens have a constitutional right that criminal aliens do not have or that § 1231(a)(6) provides different detention authority for criminal and law-abiding aliens. Neither contention has any basis in law or in the language of § 1231(a)(6).

Congress does not appear to have had the same difficulty as the Government in understanding the scope of *Zadvydas* or the fact that § 1231(a)(6) does not authorize the indefinite detention of even the most dangerous aliens. In section 412(a) of Title IV of the USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 305 (2001), Congress enacted 8 U.S.C. § 1226a, which provides that the Attorney General shall take custody of any alien he certifies as a terrorist and "shall maintain custody of such an alien until the alien is

removed from the United States." 8 U.S.C. § 1226a(a)(1) (2004). Congress specifically addressed the possibility of indefinite detention for aliens who cannot be removed:

> **Limitation on indefinite detention.** An alien detained solely under paragraph (1) who has not been removed under section 1231(a)(1)(A) of this title, and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

§ 1226a(a)(6).

Importantly, § 1226a applies by its own terms both to inadmissible and deportable aliens. *See* § 1226a(a)(3)(A) (including, among aliens eligible for certification as terrorists, inadmissible aliens that are described in §§ 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), and 1182(a)(3)(B)). This statute illustrates Congress' understanding that § 1231(a)(6) does not authorize indefinite detention; otherwise, there would be no reason to include inadmissible aliens within the scope of § 1226a. In contrast to the silence in § 1231(a)(6), Congress' explicit handling and limitations on indefinite detention in § 1226a further confirms that it understands this Court's holding in *Zadvydas* to control § 1231(a)(6) regardless of the class of alien being detained.[7]

In short, the Government has failed to meet or overcome Mr. Benitez's argument that § 1231(a)(6) must mean the same thing when applied to him as when applied to Mr. Zadvydas.

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[7] Indeed, this Court concluded in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that one indicator that Congress did not intend § 1231(a)(6) to authorize indefinite detention was that, in contrast to the silence in § 1231(a)(6), another statute, 8 U.S.C. § 1537(b)(2)(C) (2001), provided for "continued detention" of an alien engaged in terrorist activities with a requirement that the Attorney General continue efforts to remove the alien and review the case every six months. [illegible] U.S. at 697.

II. THE GOVERNMENT HAS ALSO FAILED TO MEET MR. BENITEZ'S CONSTITUTIONAL ARGUMENTS.

The Government's arguments also fail to overcome Mr. Benitez's alternative argument that indefinite detention of inadmissible aliens ordered removed would raise a sufficiently serious constitutional question to warrant applying the same reasoning as in *Zadvydas*. The Government's arguments in response suffer from two different fatal flaws: (A) they depend on facts not present in this case, and (B) they create more separation of powers problems than they resolve.

A. The Government's Arguments Depend on Circumstances Not Present in Mr. Benitez's Case.

The Government's policy and constitutional arguments in favor of its asserted authority to detain Mr. Benitez depend on its assertion that Mr. Benitez and other aliens like him are dangerous and that Mariel Cubans who were allowed to enter and reside in the United States are no different from other aliens paroled pursuant to § 1182(d)(5)(A). The Government does not acknowledge, much less attempt to rebut, the detailed arguments in Mr. Benitez's initial brief that belie the foundation for the Government's position. (*See* Initial Br. at 38-46.)

For example, the Government's position that Mr. Benitez and similarly situated aliens are dangerous is belied by the facts that (1) nothing in § 1231(a)(6) requires a determination that a detained alien is dangerous to anyone, (2) the Cuban Review Panel has never determined that Mr. Benitez is dangerous, and (3) the panel has twice found that he had sufficiently proven that he was not dangerous to qualify him for release under the immigration regulations. (Answer Exh. J; Resp. to Cert. Pet. at 8-9.)

B. The Government's Position Does Not Recognize the Proper Role of the Judiciary Under the Facts of This Case.

The Government suggests that this Court would overstep its judicial role by enforcing any limits on the Government's ability to imprison aliens who were once paroled, but subsequently ordered removed. These arguments again overlook the facts of this case.

1. The Courts' Proper Role Is To Determine the Constitutional Consequences of the Political Branches' Decision to Invite and Welcome the Mariels Into Our Society.

In perhaps the most eloquent passage of its brief, the Government contrasts the roles of the political branches (largely the executive) with the role of the judiciary with regard to aliens seeking to enter our country:

> When an individual is formally admitted to the United States, a court's recognition and protection of a liberty interest does not *cause* the entry. The court's role (*e.g.*, in *Zadvydas*) simply delineates the *consequences*, statutory and constitutional, of an entry that has already been authorized by the political Branches and has been accomplished without judicial intervention. By contrast, when the political Branches have stopped an alien at the border and have made the quintessentially political determination that he should not be admitted or released into the United States, a judicial order compelling his release into the Country would *cause* an entry that the political Branches have refused and, in the process, would directly countermand the specific and individualized entry decision made by those whom the Constitution has charged with protecting the borders and conducting foreign relations.

(Resp. Br. at 20.)

This argument may have substantial appeal, but it provides no support for the Government in this case. If and when this Court orders the Government to release Mr. Benitez (subject to whatever supervision the political branches deem appropriate, *see* 8 U.S.C. § 1231(a)(3) (2003)), it will not *cause* an entry that the political branches have refused. The political branches acted in 1980. They did not, contrary to the tenor of the Government's argument, make the "quintessentially political determination that [Mr. Benitez] should not be admitted or released into the United States." To the contrary, the Carter Administration made the political judgment not only to allow Mr. Benitez and his compatriots to enter the United States and live among us, but to invite them to leave Cuba to be received here with an "open heart and open arms." (*See generally* Pet. Br. at 2-5; Amicus Br. of Fla. Immigrant Advocacy Center et al. at 16-30.)

Thus, in all except the most artificial sense of an asserted legal fiction, it was the political branches that *caused* Mr. Benitez's entry into the United States. Now it is up to the judicial branch to delineate the statutory and constitutional *consequences* of the Carter Administration's political decision.

2. The Government's "Just Trust Us" Procedural Due Process Arguments Ignore the Role of the Judiciary.

The Government asserts that its parole regulations satisfy any procedural due process rights that Mr. Benitez may have. (Resp. Br. at 43-49.) This argument boils down to a plea to "just trust us." The Court should reject this argument for at least two reasons: (1) the Government's procedures do not provide a neutral factfinder, and (2) Mr. Benitez's own circumstances demonstrate that the procedures are illusory.

First, while the Government explains its internal procedures in some detail (Resp. Br. at 45-47), it neglects

to mention who makes the ultimate determination whether to release a detained alien. The authority to release a detained Mariel Cuban rests in the discretion of the Associate Commissioner for *Enforcement*. 8 C.F.R. § 212.12(b) (2003). This officer is charged with "the planning, oversight, and advancement of *enforcement* programs engaged in interpretation of the immigration and nationality laws, and the development of Service policies to assist *enforcement* activities." 8 C.F.R. § 100.2(c)(2) (2003) (emphasis added). In other words, the adjudicator is also in charge of enforcing the laws against the claimant.

As it has in other recent contexts, this Court should reject this kind of "fox watching the hen house" procedure as a means of providing procedural due process. For example, in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Court rejected the Government's argument that due to the Executive's war powers and the "limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict," the courts should defer to the Executive's determination of whether a citizen captured on the battlefield was fighting United States forces, without any review by a neutral factfinder. *Id.* at 2645-48 (O'Connor, J., plurality op.)[8]; *see also Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge in the first instance'. . . .") (quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972)).

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[8] Although only three justices (the Chief Justice and Justices Kennedy and Breyer) joined Justice O'Connor's opinion, four others concurred that due process requires a hearing before a neutral factfinder to justify continued detention. *Id.* at 2660 (Souter, J., concurring in part, dissenting in part) (joined by Ginsburg, J.) (contending that the stated reason for detention was invalid, but noting that if it were sufficient, the plurality's procedures would be required); *id.* at 2671 (Scalia, J., dissenting) (joined by Stevens, J.) (contending that detention could only be continued in conjunction with a criminal prosecution in court).

Second, contrary to the Government's contention that these procedures "are meaningful, as [Mr. Benitez's] own impending release demonstrates," (Resp. Br. at 47), Mr. Benitez's circumstances demonstrate beyond any doubt that the current procedures are illusory.

On December 12, 2001, less than six months after the Government first detained Mr. Benitez, the Cuban Review Panel first determined that Mr. Benitez was due to be released. (*See generally* Initial Br. at 7.) Nearly three years later, Mr. Benitez is still waiting to be released.[9] Mr. Benitez no longer has any reason to believe the Government's repeated assurances of his "impending release," and neither should this Court. *Cf. Ngo v. INS*, 192 F.3d 390, 398-99 (3d Cir. 1999) (finding INS violated procedural due process of detainee where it denied release multiple times based on nothing more than cursory reference to ten-year-old convictions); *Phan v. Reno*, 56 F. Supp. 2d 1149, 1157-58 (W.D. Wash. 1999) (finding procedural due process violations in parole determinations because, among other things, there was no neutral decision maker); *St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) (same).

3. The Government Fails to Appreciate the Difference Between a Hostile Nation and a Human Being Born in a Hostile Nation.

Finally, the Government raises the specters of national security and foreign relations in an effort to shield its treatment of Mr. Benitez and other detainees from judicial scrutiny. First, it suggests that the responsibility for the humane treatment of these people "more appropriately rests with the alien's country of origin" because Mr.

[9] His release was temporarily revoked due to a wholly unsupported charge that he participated in a planned escape, a charge he was never given the opportunity to refute. (J.A. 52-53, 55-58, 64 n.9.)

Benitez "is no more ours than theirs." (Resp. Br. at 47.) Then, the Government complains that Mr. Benitez's position in this case "will force the government to resort to new international diplomacy, 'trade sanctions,' and military force" to deal with countries that send their citizens here against our will.[10] (Resp. Br. at 48-49 n.27.) These arguments have an alarming flaw.

Our nation was founded on the principles that "all men are created equal" and that people are born with "unalienable rights." Since the Civil War and the enactment of the Fourteenth Amendment and, more recently, the enactment of laws prohibiting discrimination on the basis of ethnicity and national origin, we have fostered the belief that a person has the right to be treated humanely and with respect, even if he or she had the misfortune of being born in a nation that opposes the United States. Even if there were some logical foundation to the suggestion that our administration is teaching Fidel Castro a lesson by imprisoning people who fled his country, that suggestion has no place in our American society.

[10] Not only does this argument ignore the fact that Mr. Benitez and the Mariels did not come to the United States against our will, it overlooks the fact that illegal aliens (*i.e.*, aliens who have gotten into the country without applying for admission at an immigration checkpoint) are fully protected against indefinite detention. *See* 8 C.F.R. § 241.13(3)(i) (2003); 66 Fed. Reg. 56,967, 56,969 (2001); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993) (noting long recognition that illegal aliens have the additional constitutional rights possessed by those lawfully admitted).

This principle shatters the Government's argument that recognizing constitutional rights for paroled aliens will make our country vulnerable to rogue nations who want to dump their worst citizens on our shores. (Resp. Br. at 39-40.) If anything, the bizarre dichotomy that the Government cannot indefinitely detain illegal aliens, but can indefinitely detain aliens who applied for admission and were paroled, would only encourage the feared rogue nations to smuggle their violent criminals into our country.

If the political branches determine that we must retaliate against Castro or any other dictator or nation that tries to infringe on our sovereignty through mass emigration, our American ideals and, more importantly, our Constitution require that we take action against that dictator or nation itself, not the innocent victims. "[I]f this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny." *Padilla*, 124 S. Ct. at 2735 (Stevens, J., dissenting); *see also United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the judgment of the United States Court of Appeals for the Eleventh Circuit and remand with instructions that the Eleventh Circuit vacate the district court's judgment and direct the district court to grant Mr. Benitez's habeas petition.

Respectfully submitted,

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In The
Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. *MEZEI* IMPROPERLY APPLIED THE ENTRY FICTION TO HOLD THAT AN ALIEN WITH SIGNIFICANT CONTACTS IN THE UNITED STATES POSSESSED NO DUE PROCESS RIGHTS 5

A. The *Mezei* Decision 5

B. The *Mezei* Decision Was Severely Criticized 7

II. *MEZEI'S* APPLICATION OF THE ENTRY FICTION HAS CREATED AN INTOLERABLE INCOHERENCE IN THIS COURT'S DUE PROCESS JURISPRUDENCE 10

A. *Mezei* Ignored Prior Jurisprudence Recognizing Due Process Protections for Aliens at the Border 11

B. The *Mezei* Holding That Aliens at the Threshold of Entry Are Unprotected by Due Process Has Been Further Undermined by the Subsequent Decisions of this Court 15

i. Due Process Developments 16

ii. Understandings of the Constitution's Territorial Scope have Expanded Since *Mezei* 19

TABLE OF CONTENTS – Continued

Page

iii. This Court has Cabined the Plenary Power Doctrine Since *Mezei* 20

C. Application of the Entry Fiction to Parolees Present in the United States with Substantial Connections to the Community Creates an Intolerable Constitutional Incoherence 22

III. THE COURT SHOULD REMEDY THE CONSTITUTIONAL INCOHERENCE CREATED BY *MEZEI* AND SUBJECT IMMIGRATION DETENTION DECISIONS TO ORDINARY *MATHEWS V. ELDRIDGE* SCRUTINY..... 25

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

CASES:

Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987)..... 20

Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) 23

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Chin Yow v. United States, 208 U.S. 8 (1908)..... 14

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Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908) 19

Downes v. Bidwell, 182 U.S. 244 (1901)..... 19

Fiallo v. Bell, 430 U.S. 787 (1977)..... 18, 21

Fok Yung Yo v. United States, 185 U.S. 296 (1902)..... 13

Fong Yue Ting v. United States, 149 U.S. 698 (1893) 13

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 19, 24

Gegiow v. Uhl, 239 U.S. 3 (1915) 14

Gilbert v. Homar, 520 U.S. 924 (1997)..... 27

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 16

Graham v. Richardson, 403 U.S. 365 (1971) 16, 18, 24

In re Griffiths, 413 U.S. 717 (1973)..... 18

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 18

INS v. Chadha, 462 U.S. 919 (1983)..... 21

Jean v. Nelson, 472 U.S. 846 (1985)..... 9, 23

Kaplan v. Tod, 267 U.S. 228 (1925)..... 12, 24

TABLE OF AUTHORITIES – Continued

Page

Korematsu v. United States, 323 U.S. 214 (1944) 3

Kwock Jan Fat v. White, 253 U.S. 454 (1920) 14

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) 17, 29

Landon v. Plasencia, 459 U.S. 21 (1982) 18, 21, 29

Mathews v. Diaz, 426 U.S. 67 (1976) 29

Mathews v. Eldridge, 424 U.S. 319 (1976) ..... *passim*

Morrissey v. Brewer, 408 U.S. 471 (1972) 16, 19, 24, 25

Nishimura Ekiu v. United States, 142 U.S. 651 (1892) 13

Plyler v. Doe, 457 U.S. 202 (1982) 18

Rafeedie v. I.N.S., 880 F.2d 506 (D.C. Cir. 1989) 28

Reid v. Covert, 354 U.S. 1 (1957) 20

Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) 10, 23

Rosenberg v. Fleuti, 374 U.S. 449 (1963) 17

In re Ross, 140 U.S. 453 (1891) 11

Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) 19

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) ..... *passim*

Sugarman v. Dougall, 413 U.S. 634 (1973) 18

Tang Tun v. Edsell, 223 U.S. 673 (1912) 14

Tod v. Waldman, 266 U.S. 113 (1924) 14

Trop v. Dulles, 356 U.S. 86 (1958) 9

Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001) 21

TABLE OF AUTHORITIES – Continued

Page

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United States ex rel. Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958) 23, 26

United States v. Jung Ah Lung, 124 U.S. 621 (1888) 13

United States v. Salerno, 481 U.S. 739 (1987) 28

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Warren v. United States, 58 F. 559 (1st Cir. 1893) 11

Washington v. Harper, 494 U.S. 210 (1990) 19

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Yamataya v. Fisher, 189 U.S. 86 (1903) 13, 14

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Zadvydas v. Davis, 533 U.S. 678 (2001) ..... *passim*

FEDERAL STATUTES AND CONGRESSIONAL BILLS:

Act of Feb. 5, 1917, ch. 29, § 15, 39 Stat. 874, 885 11

Act of Feb. 20, 1907, ch. 1134, § 16, 34 Stat. 898, 903 11

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF THE *AMICI CURIAE*[1]

This case addresses the due process rights of aliens in the United States who have been detained indefinitely pending final removal, because the United States is unable to deport them. *Amici curiae* are 24 professors of constitutional law, immigration law, foreign relations law, American legal history and federal courts at law schools in the United States. *Amici* have expertise in the constitutional law of the United States relating to foreign relations, immigration, and due process, and many have written about the due process principles raised by this case.[2] The professional interest of *amici* is in ensuring that the Court is fully and accurately informed of the circumstances giving rise to the "entry fiction" that aliens in the United States are unprotected by the Due Process Clause in some narrow contexts, and the extent to which that doctrine has become fundamentally irreconcilable with this Court's constitutional jurisprudence. Specifically, *amici* urge the Court not to reaffirm the decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and urge the Court to hold that the removal power of the government, particularly when that power results in

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[1] Pursuant to Supreme Court Rule 37.6, *amici*, who are listed on the inside front cover, state that no counsel for any party authored this brief in whole or in part. The brief was written by counsel for *amici*, with the assistance of Marc Ellenbogen, Joanne Savage, Rebecca Smullin and Stephen Vladeck, students at the University of Texas School of Law and Yale Law School. No one other than counsel for *amici curiae* has made a monetary contribution to the preparation or submission of the brief. Both Petitioner and Respondent have consented to the filing of this brief. Letters of consent are being filed with the brief.

[2] Counsel for *amici* Melford O. Cleveland served as a law clerk to Associate Justice Hugo L. Black during the 1952-53 Supreme Court term, when *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), was decided.

the indefinite detention of aliens with lengthy contacts with the United States, is meaningfully limited by the requirements of due process.

SUMMARY OF ARGUMENT

As in *Zadvydas,* the question before this Court is whether aliens who were paroled into the United States many years ago, who cannot be removed, and who have significantly greater affiliations with the national community than most deportees, "are to be condemned to an indefinite term of imprisonment within the United States." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). Relying on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the government maintains that because parolees are subject to the "entry fiction" that they have never entered the United States, they are entitled to no due process protection against indefinite and prolonged detention, notwithstanding *Zadvydas*. Appellee's Br. to 11th Cir. at 19-20; *id.* at 22.

In *Mezei*, this Court held that aliens "on the threshold of initial entry" stand "on a different footing" from aliens "who have once passed through our gates." *Mezei*, 345 U.S. at 212. Indeed, the Court concluded bluntly, "'[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" *Id.* (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)). The Court accordingly ruled, during the height of the Cold War, that Mezei could be excluded from the United States and detained indefinitely on Ellis Island, based on secret national security grounds and without any opportunity for a hearing, because no other country was willing to take him.

Mezei was an atrocity in its day and should not be reaffirmed by this Court. The *Mezei* Court erred profoundly in three important ways. First, the Court refused

to credit Mezei's very real and longstanding ties to the United States community as a legal resident of 25 years, and instead "assimilated" him to the status of a first time applicant at the border. *Mezei*, 345 U.S. at 214. Second, in holding that due process for the alien seeking admission is whatever Congress says it is, the Court ignored the preceding half century of constitutional jurisprudence recognizing increasing due process protections in the exclusion context. And third, the Court concluded that Mezei's *de facto* detention as a result of the government's inability to deport him did not constitute a deprivation of liberty, but was simply an unfortunate byproduct of Mezei's excludability.[3]

Mezei was severely criticized in its day for all these failings, and its disharmony with U.S. constitutional principles has only increased as the subsequent decisions of this Court have further undermined the holding. This Court has never reaffirmed the government's ability to indefinitely detain inadmissible aliens who cannot be removed. The decision stands, like *Korematsu v. United States,* 323 U.S. 214 (1944), as an unwanted relic of its era.

Amici Law Professors write to submit that this Court should not repeat and compound the errors of *Mezei* by reaffirming that ruling to uphold the indefinite detention of the Mariel Cuban detainees, who have lived, worked, paid taxes, and built friendships, families, and communities in our nation for over twenty years. *Amici* instead

[3] *Amici* Law Professors write to urge the Court not to repeat the first two errors of *Mezei* in this case. As set forth more fully in the Brief of the American Bar Association *Amicus Curiae* in Support of Petitioner, the *Zadvydas* decision corrected the third error of *Mezei* by recognizing that an unremovable alien's continued detention could not escape due process scrutiny merely because the alien was no longer entitled to remain in the United States. *Zadvydas*, 533 U.S. at 695-96.

urge the Court to continue the important project it began with *Zadvydas* of remedying the longstanding incoherence in our constitutional due process jurisprudence that is created by the fiction that parolees physically present in the U.S. with the consent of the government, often for many years, acquire no liberty interests or due process rights whatsoever as a result of their lawful contact with our national community. The bright line distinction drawn in *Mezei* between aliens deemed to be at the border, who do not have due process protection, and those within the United States, who do, should be replaced with the nuanced balancing approach that this Court has applied to due process in other contexts. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). Under the *Mathews* test, the due process rights of aliens would be determined by weighing the alien's legal status and the extent and nature of her ties to the national community. Aliens truly on the threshold of initial entry ordinarily would be entitled to the lowest due process protections, and the government could have a legitimate interest in detaining an alien for lengthy periods where specific, articulable national security concerns were involved or the alien otherwise posed a significant danger to the community. But rigorous procedural protections would have to be afforded in such circumstances, and no alien subject to U.S. authority would exist in a fictitious limbo outside the law.

ARGUMENT

I. *MEZEI* IMPROPERLY APPLIED THE ENTRY FICTION TO HOLD THAT AN ALIEN WITH SIGNIFICANT CONTACTS IN THE UNITED STATES POSSESSED NO DUE PROCESS RIGHTS

A. The *Mezei* Decision

The national security immigration cases decided in the early 1950's at the height of both the Korean War and the McCarthy era represent the "modern zenith" of the entry fiction and judicial deference to congressional decisions regarding immigration. Charles Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 954 (1995). In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court affirmed the exclusion, based on secret national security grounds and without a hearing, of the non-citizen wife of a U.S. soldier, holding that regardless of the rule applicable to persons "who have gained entry into the United States," the government's decision to exclude an alien presenting at the border was "final and conclusive." *Id.* at 543.[4]

Mezei was the most extreme example of the Court's McCarthy Era jurisprudence of withholding judicial scrutiny of even the most egregious violations of basic rights. Ignatz Mezei was a long-term lawful resident alien

[4] *Knauff* prompted substantial outcry in Congress and elsewhere. After numerous congressional hearings and condemnatory newspaper reports, the Attorney General reopened Ms. Knauff's case and she ultimately was ordered admitted to the United States. *See* Weisselberg, *supra*, at 958-64; *see also Mezei*, 345 U.S. at 225 (Jackson, J., dissenting) (describing *Knauff* as "a near miss, saved by further administrative and congressional hearings from perpetrating an injustice") (citation omitted).

who had come to the United States in 1923 and married an American citizen. During World War II, he had served in the U.S. Coast Guard, worked as an air raid warden, and sold war bonds. Brief for Respondent at 2, *Mezei* (No. 139). In 1948, Mezei attempted to travel to Romania to visit his dying mother and, after being denied permission to enter Romania, spent 19 months in Hungary attempting to return home to the U.S. *Mezei*, 345 U.S. at 208. He finally secured a visa and returned to the United States in 1950, where he was permanently excluded from re-entering for unspecified "security reasons." *Id.* The Government unsuccessfully attempted to deport Mezei to Hungary. France and Britain both denied him entry, as did many Latin American countries. *Id.* at 208-09.

Mezei petitioned for habeas corpus, and the district court granted the petition, finding that his then 21-month detention on Ellis Island was "excessive and justifiable only by affirmative proof of [Mezei's] danger to the public safety." *Id.* at 209 (citation omitted). The Second Circuit affirmed. *United States ex rel. Mezei v. Shaughnessy*, 195 F.2d 964 (2d Cir. 1952).

The Supreme Court upheld Mezei's indefinite detention without a hearing. Justice Clark found for the Court that "neither [Mezei's] harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding." 345 U.S. at 213. Justice Clark aggressively applied the entry fiction to hold that Mezei was "an entrant alien or 'assimilated to [that] status' for constitutional purposes." *Id.* at 214 (alteration in original) (citation omitted). He had no right to enter, and the government's refusal to parole him into the United States, even though it resulted in his *de facto* indefinite detention, deprived him of no constitutional right. *Id.* at 215.

Justices Black, Frankfurter, Jackson, and Douglas all dissented. Justice Black's dissent with Douglas condemned the Court for leaving Mezei's liberty "completely at the mercy of the unreviewable discretion of the Attorney

General." 345 U.S. at 217 (Black, J., dissenting). Justice Jackson's opinion, which Justice Frankfurter joined, bitterly protested the majority's application of *Knauff* in this context. "Because the respondent has no right of entry," Jackson wrote, "does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities?" *Id.* at 226 (Jackson, J., dissenting). Just as "eject[ing] him bodily into the sea" would constitute a deprivation of life, Mezei's detention, "occurring within the United States or its territorial waters," constituted a deprivation of liberty which "may be done only by proceedings which meet the test of due process of law." *Id.* at 226-27. The majority's contention that Mezei was not detained in violation of his liberty "overwork[ed] legal fiction." *Id.* at 220.

B. The *Mezei* Decision Was Severely Criticized

Like the *Knauff* case before it, the *Mezei* decision provoked considerable public outcry. Editorials condemning the decision appeared in the New York Times and the Washington Post, and other newspapers around the country "excoriated the opinion."[5] Two private bills were introduced in Congress on Mezei's behalf.[6] Attorney General Brownell eventually agreed to grant Mezei a

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[5] Weisselberg, *supra*, at 970 n.201 (collecting newspaper reports). *See also Opening the Door*, N.Y. Times, Apr. 24, 1953, at 22 (describing the decision as "cruel, intolerant and downright un-American"); *Deprived of Liberty*, Wash. Post, Mar. 18, 1953, at 12 ("the indefensible consequences of the decision demand further attention").

[6] Senator Langer introduced a private bill for the relief of Ignatz Mezei on March 23, 1953. *See* S. 1414, 83d Cong. (1953). Representative Celler introduced a private bill on April 24, 1953. *See* H.R. 4858, 83d Cong. (1953).

hearing, and Mezei ultimately was paroled into the U.S.[7] In short, the process Mezei was finally afforded helped avert an egregious injustice.

The *Mezei* decision (and the *Knauff* case on which it relied) was heavily criticized in its day, both for failing to comport with the Court's existing due process jurisprudence, which recognized due process protections in exclusion proceedings, and for the Court's application of the fiction that an alien with lengthy ties to the United States possessed no greater due process protections than an initial entrant. In his famous dialogue on federal court jurisdiction, Professor Henry Hart criticized as "patently preposterous" the proposition that due process for aliens denied entry was whatever Congress had provided. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1392 (1953); *see also id.* at 1395 (The decision "trivialize[d] the great guarantees of due process" to reach "brutal conclusions") (footnote omitted).[8] The

[7] Weisselberg, *supra*, at 972. At the exclusion hearing, the government established that Mezei had pleaded guilty in 1935 for possessing a bag of stolen flour, for which Mezei had been fined $10, *id.* at 976 & n.232, and that he had played a minor role in the Communist Party twenty years earlier. *Id.* at 985.

[8] *See also* Hart, *supra*, at 1394 (condemning the *Knauff* decision for relying indiscriminately upon early harsh decisions denying due process to aliens in both admission and deportation cases, "without noticing that the principle which had compelled repudiation of the deportation precedents required repudiation also of the others"); Note, *The Supreme Court, 1952 Term,* 67 Harv. L. Rev. 96, 100 (1953) (criticizing *Knauff* for "resurrect[ing]" a doctrine seemingly "inconsistent with the extensions of the Due Process Clause to limit the plenary congressional power over aliens"); John P. Frank, *Fred Vinson and the Chief Justiceship,* 21 U. Chi. L. Rev. 212, 231-32 (1954) ("[Mezei] conveys the most brutal shock to the moral sense of any of the opinions in this tragedy-laden area. . . . "). For other contemporary critiques, *see* Weisselberg, *supra*, at 985 n.267 (collecting sources).

scholarly[9] and judicial[10] criticism of the decision has continued unabated.

[9] *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 Geo. Immigr. L. J. 365, 374 (2002) ("The rule affirmed in *Mezei* . . . is wildly out of step with modern constitutional law."); T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. Pitt. L. Rev. 237 (1983); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 Wm. & Mary L. Rev. 11, 27-34 (1985); Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 200-01 (1987); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165, 173, 176 (1983) (The Court "misread[ ] the cases it invoked and ignor[ed] many others" yielding a doctrine that was "scandalous . . . deserving to be distinguished, limited, or ignored."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1642 (1992) (The Court's developing due process jurisprudence for excludable aliens "turned colder" with the *Knauff* and *Mezei* decisions "at the height of McCarthyism and the nation's preoccupation with the perceived Communist threat."); Gerald L. Neuman, *Strangers to the Constitution*, 253 n.2 (1996); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 1052 (1998) ("The legal fiction that exclusion merely withholds a benefit was . . . stretched beyond decency in *Mezei*."); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 20 (1984) ("[T]hese decisions [*Knauff* and *Mezei*] are easy to denounce and their reasoning is not difficult to demolish."); Peter H. Schuck, *Developments in the Law – Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1322-24 (1983) ("In advancing this language of absolute exclusion power, the Court deviated sharply from fifty years of doctrinal development"). *See also* Ronald D. Rotunda & John E. Nowak, 2 *Treatise on Constitutional Law* § 17.4 n.62 (2d ed.1986) ("The ability to detain unadmitted aliens for an indefinite period of time, and without procedural safeguards . . . seems difficult to rationalize in terms of modern conceptions of the fundamental fairness principle that lies at the heart of due process.").

[10] The decision has been excoriated in the courts. *E.g., Trop v. Dulles,* 356 U.S. 86, 102 n.36 (1958) (Warren, C.J.) (plurality opinion) (Mezei's extended confinement without judicial review was "intolerable"); *Jean v. Nelson*, 472 U.S. 846, 868-69 (1985) (Marshall, J.,

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II. *MEZEI'S* APPLICATION OF THE ENTRY FICTION HAS CREATED AN INTOLERABLE INCOHERENCE IN THIS COURT'S DUE PROCESS JURISPRUDENCE

By applying the entry fiction to create a bright line rule between the constitutional rights of aliens at the border and those who have entered the United States, *Mezei* ignored the preceding fifty years of this Court's jurisprudence, which recognized due process protections for aliens at the border, and which had not distinguished sharply between the rights of aliens in exclusion and deportation proceedings. It was *Mezei* that created a significant disharmony in the rights of these two groups, with the result that aliens who entered the United States (whether lawfully or clandestinely) and later were found to be removable were entitled to due process protection, while aliens presenting lawfully at the border and found to be inadmissible were not. This dissonance has only increased since *Mezei*, as the Court has upheld broader due process protections for aliens who have "entered" the United States and in other contexts. The Court's application of the Constitution abroad in some circumstances, and its recognition that Congress' "plenary" power over immigration is limited by the Constitution, have exacerbated the incongruence between the *Mezei* entry fiction and contemporary constitutional jurisprudence. The constitutional incoherence becomes particularly intolerable

dissenting) (The "broad dicta [of *Mezei*] can withstand neither the weight of logic nor that of principle, and has never been incorporated into the fabric of our constitutional jurisprudence."); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387, 1388 (10th Cir. 1981) (rejecting "euphemistic fiction" that detention of excludable aliens is merely a "continuation of the exclusion" without Fifth Amendment implications and describing *Mezei* as "the nadir of the law with which the opinion dealt").

when the entry fiction is applied to aliens paroled into the United States, who may live and work in the United States for years while nevertheless being deemed "nonpersons" for purposes of due process.

A. *Mezei* Ignored Prior Jurisprudence Recognizing Due Process Protections for Aliens at the Border

Before *Knauff* and *Mezei* the entry fiction did not have significant implications for the Constitution's application to aliens. Although the *Mezei* Court's assertion that aliens at the border are unprotected by due process appeared to be driven by late-nineteenth century theories that the Constitution was limited to U.S. territory,[11] the distinction between aliens who had landed, or "entered," the U.S. and those at the border originally was intended to protect shipping carriers from liability for allowing aliens to disembark unlawfully, *see Warren v. United States*, 58 F. 559 (1st Cir. 1893) (discussing carrier sanctions), and to establish that mere physical presence in the U.S. did not confer a right to remain under the immigration statutes.[12]

[11] *E.g.*, *In re Ross*, 140 U.S. 453, 464 (1891) ("The Constitution can have no operation in another country."); Gerald L. Neuman, *Strangers to the Constitution* 7-8 (1996) (discussing now-abandoned "strict territoriality" approaches to the Constitution).

[12] The entry fiction arose in the late nineteenth century, when it became impossible to conduct all immigration inspections before passengers disembarked from arriving vessels. Congress therefore authorized the "temporary removal" of aliens from vessels for purposes of inspection, but provided that such a transfer would not be deemed "a landing." *See* Act of Feb. 5, 1917, ch. 29, § 15, 39 Stat. 874, 885; Act of Feb. 20, 1907, ch. 1134, § 16, 34 Stat. 898, 903; Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085-86 (each containing the same language regarding "removals" and "landings."). The Court later extended this

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Indeed, early cases had recognized that the Constitution applied to aliens at the threshold of entry. In *Chy Lung v. Freeman*, 92 U.S. 275 (1875), for example, the Court reversed the exclusion of an alien on a boat in San Francisco harbor on constitutional grounds. Although the Court ultimately relied on the Commerce Clause, *id.* at 280-81, the plaintiff also raised Fourteenth Amendment equal protection claims, Brief for Plaintiff in Error at 5-6, *Chy Lung*, 92 U.S. 275 (1875) (No. 478), and much of the Court's analysis credited her claim. *Chy Lung*, 92 U.S. at 278 (holding that it was "hardly possible to conceive a statute more skillfully framed, to place in the hands of a single man" an arbitrary power). *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 108-109 (2002). Moreover, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), established that the Fourteenth Amendment's protections applied universally "to all persons within the territorial jurisdiction," *id.* at 369, without elaborating on this territorial limitation, and the Court cited the *Chy Lung* ruling regarding an alien in harbor in support of its equal protection analysis. *Id.* at 374. At any rate, both aliens on ships docked in U.S. harbors and those on U.S. soil were clearly within U.S. territory for the purposes of territorial jurisdiction.

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entry fiction to include parolees – aliens who are allowed to enter and remain in the United States with the government's permission, but who are denied admission and remain "in theory of law at the boundary line and [gain] no foothold in the United States." *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (citation omitted). In 1952, Congress formally applied the entry fiction to nonimmigrant parolees by providing that parole "shall not be regarded as an admission" into the United States. *See* Immigration and Nationality Act of 1952, ch. 477, § 212(d)(5), 66 Stat.163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5) (2000)).

Subsequent cases also did not sharply distinguish between the procedural protections afforded aliens on either side of the "entry" line. The Court's late-nineteenth century decisions recognized broad congressional authority over both entry and deportation (or "expulsion"). *See, e.g., Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding exclusion of alien at the border as a sovereign power); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (upholding deportation on the grounds that the powers to exclude or expel were "but parts of one and the same power"). But the Court recognized that even the exclusion power was limited by the Constitution, *Chae Chan Ping*, 130 U.S. at 604 (congressional authority is limited "by the constitution itself"), and scrutinized both exclusions and deportations for statutory compliance. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660, 663 (1892) (reviewing to determine whether exclusion is "in conformity with" law); *Fong Yue Ting*, 149 U.S. at 729-730 (reviewing legality of deportation decision on the merits).[13]

The Court gradually moved away from the plenary power decisions of the late 1800's to recognize greater procedural protections for both entry and deportation. In *Yamataya v. Fisher*, 189 U.S. 86 (1903), the Court held that the removal of an unadmitted alien who had landed four days earlier was governed by "the fundamental principles that inhere in 'due process of law,'" including the right to a hearing regarding deprivations of liberty. *Id.* at 100-01. The Court observed that in construing "acts of

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[13] A number of decisions also rejected executive exclusion decisions for failure to comport with statutory requirements, *e.g., United States v. Jung Ah Lung*, 124 U.S. 621, 628-32 (1888) (implying authority from congressional statute to determine whether alien was properly excluded); *Fok Yung Yo v. United States*, 185 U.S. 296, 302 (1902) (courts will review decision to exclude non-citizen where "required by the Constitution . . . to intervene").

Congress, such interpretation ought to be adopted as . . . will bring them into harmony with the Constitution." *Id.* at 101.

The Court soon began expressly construing exclusion statutes to comport with basic due process. *Chin Yow v. United States,* 208 U.S. 8 (1908), upheld the finality of an exclusion decision "on the presupposition that the decision was after a hearing in good faith," *id.* at 12, and was understood as opening the door to "expanding judicial review" of exclusion hearings. *See* Kenneth C. Davis, *Administrative Law* § 237, at 828 (1951). Read together, *Yamataya* and *Chin Yow* led to greater due process protections in both the exclusion and deportation contexts.[14] In numerous other cases, the Court treated deportation and exclusion interchangeably. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1641 & n.76 (1992) (collecting cases).

It was *Knauff* and *Mezei* which purported to establish a bright line rule between aliens entitled to due process protection and those who were not. In stating that due process for aliens at the border was whatever Congress said it was and applying the entry fiction to a long term

[14] *See* Clement L. Bouvé, *A Treatise on the Law Governing the Exclusion and Deportation of Aliens in the United States* 138-41 (1912). *See also Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (executive's exclusion determination failed to comply with act of Congress and denied right to fair hearing); *Kwock Jan Fat v. White*, 253 U.S. 454, 459 (1920) (granting relief because procedures cannot be "unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law"); *Tang Tun v. Edsell*, 223 U.S. 673, 681-82 (1912) (review of executive determination to ensure its authority was "fairly exercised"); *Tod v. Waldman*, 266 U.S. 113 (1924) (aliens detained pending entry hearing entitled to be released if hearing not held within definite period of time); Note, *Developments in the Law – Immigration and Nationality*, 66 Harv. L. Rev. 643, 671 (1953).

legal resident, the *Mezei* Court reversed the jurisprudential developments of the prior fifty years with respect to aliens seeking entry, while leaving those decisions in place for aliens "inside" the country.[15] As a result, even at the time, the decision established an unwarranted disharmony between the due process rights of aliens on one side or the other of the entry fiction line.

B. The *Mezei* Holding That Aliens at the Threshold of Entry Are Unprotected by Due Process Has Been Further Undermined by the Subsequent Decisions of this Court

This Court's jurisprudence in the half century since *Mezei* has exacerbated the decision's anomalous status in our constitutional system and has rendered untenable the proposition that aliens at the border have no due process rights. The post-*Mezei* Court has replaced the right/privilege distinction for determining constitutional rights and adopted the *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), balancing test under the Due Process Clause. The Court has recognized greater due process rights for aliens in the immigration context and elsewhere, and has significantly expanded the concept of liberty in other areas. The Court's retreat from its strictly territorial construction of the Constitution's scope has rendered an anachronism the fiction that aliens on U.S. soil who have not "entered" are unprotected by the Constitution. And the Court's recognition that Congress'

[15] *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 Harv. L. Rev. at 1392, 1394. Hart criticized *Mezei* and *Knauff* for "ignor[ing] the painful forward steps of a whole half century of adjudication." *Id.* at 1396; *see also id.* at 1391 ("There arose up new justices in Washington which knew not Joseph. Citing only the harsh precepts of the very earliest decisions, they began to decide cases accordingly, as if nothing had happened in the years in between.").

power over immigration is subject to ordinary constitutional constraint has reined in the plenary power doctrine over immigration. All of these developments have rendered *Mezei* irreconcilable with contemporary constitutional jurisprudence.

i. Due Process Developments

The right/privilege distinction which governed the determination of constitutional rights when *Mezei* was decided has since been rejected by this Court in decisions applying due process protections to interests traditionally considered "privileges." *Compare Knauff*, 338 U.S. 537, 542 (1950) ("[A]n alien who seeks admission to this country" claims not a "right," but a "privilege," which is granted "only upon such terms as the United States shall prescribe."); *with Graham v. Richardson*, 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (rejecting the right/privilege distinction for determining liberty interests implicated by revocation of criminal parole). *See also* Motomura, *supra*, at 1650-56 (discussing impact of abandoning right/privilege distinction on the *Mezei* doctrine). The Supreme Court has also adopted the flexible *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), balancing test for determining what process is due in a given context, as discussed further in Part III, below. Thus, although Mezei was viewed by the 1950s Court as seeking only the "privilege" of entry, his interests would be viewed and weighed through a very different lens under modern due process jurisprudence. *See* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165, 167 (1983) ("The Supreme Court's approach to due process has undergone a virtual revolution since [*Knauff* and *Mezei*].").

The Court has also eroded the entry fiction by recognizing due process protections for returning aliens like Mezei in some contexts. The tension began with the Court's decision in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), which was decided only a month prior to *Mezei*. The alien in that case was a legal resident who had left the United States for four months as a seaman, and like Mezei, was excluded at Ellis Island without a hearing. *Id.* at 592-95. While the Court "assimilated" Mezei to the status of a first time applicant lacking due process rights, however, Kwong Hai Chew's status was "assimilate[d] . . . to that of an alien continuously residing and physically present in the United States." *Id.* at 596. In short, the legal resident at the border in *Mezei* was deemed never to have entered the United States, while the legal resident in *Chew* was deemed never to have left. Even the *Chew* Court recognized that the constitutional rights of resident aliens should not turn on such fictions:

> While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process. *His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him.*

Id., at 601 (emphasis added). The Court accordingly construed the exclusion laws that it had applied in *Knauff* and *Mezei* as inapplicable to Chew.

In *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), the Court held that a resident alien who had gone to Mexico for "about a couple hours," *id.* at 450, could not be subjected to exclusion proceedings at all. The Court read *Chew* as recognizing that returning resident aliens continued to be protected by the Fifth Amendment, *id.* at 460, and concluded that where a resident alien's trip abroad was

"innocent, casual, and brief," he would not be deemed to have made an "entry" upon his return. *Id.* at 461-62. In *Landon v. Plasencia*, 459 U.S. 21 (1982), the Court again held that while a lawful permanent resident who had departed the U.S. for two days could be placed in exclusion proceedings upon her return, she remained entitled to the full panoply of constitutional due process protection that she would have possessed if she had never left. The recognition by the *Zadvydas* dissenters that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious," *Zadvydas,* 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting), confirms this Court's recognition of due process rights for aliens at the border and the infirmity of the *Mezei* holding.

The Supreme Court also has expanded the constitutional protections owed aliens apart from the right to enter or stay in this country. *See, e.g., Plyler v. Doe,* 457 U.S. 202 (1982) (Fourteenth Amendment protects undocumented alien children from discrimination in public education); *Fiallo v. Bell,* 430 U.S. 787, 792 (1977) (congressional decisions regarding the classes of aliens that were eligible for admission were subject to constitutional scrutiny); *Hampton v. Mow Sun Wong,* 426 U.S. 88, 102-03 (1976) (Due Process Clause protects aliens from discrimination in federal civil service employment); *Sugarman v. Dougall,* 413 U.S. 634 (1973) (Fourteenth Amendment protects aliens from discrimination in state civil service employment), *In re Griffiths*, 413 U.S. 717 (1973) (Fourteenth Amendment prohibits state from barring aliens from the practice of law); *Graham v. Richardson,* 403 U.S. 365, 376 (1971) (Fourteenth Amendment protects resident aliens against discrimination in state welfare benefits).

Finally, the Court has significantly expanded the protections afforded by the Due Process Clause outside the immigration context. For example, due process now limits the power of the government to impose incarceration or to worsen significantly the nature of the punishment imposed.

See, e.g., Vitek v. Jones, 445 U.S. 480, 488 (1980) (transfer to mental institution); *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974) (loss of prison good-time credits); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (revocation of parole); *see also Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (forced administration of psychotropic drugs). All of these developments render anachronistic the holding that an alien in *Mezei*'s shoes lacks due process protection.

ii. Understandings of the Constitution's Territorial Scope have Expanded Since *Mezei*

To the extent that *Mezei* relied upon the theory that the Constitution is limited to U.S. territory to deny due process protection to aliens "deemed" at the border, that doctrine also has since been abandoned, as the Court has adopted a flexible approach to the Constitution's application abroad. Even by 1953, the strict territoriality rationale had been significantly eroded. In the 1901 *Insular Cases*, the Supreme Court held that fundamental constitutional rights applied beyond U.S. shores to unincorporated U.S. possessions. *E.g., Downes v. Bidwell*, 182 U.S. 244, 287, 298 (1901) (White, J., concurring). In *Russian Volunteer Fleet v. United States,* 282 U.S. 481, 491-92 (1931), the Court recognized a Russian corporation located entirely abroad as an "alien friend[] embraced within the terms of the Fifth Amendment" for purposes of challenging a taking of property by the federal government. *See also Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908) (foreign corporation may sue under the Fourteenth Amendment to recover property stolen from abroad and brought to U.S.). Foreign corporations located entirely outside the United States are likewise entitled to due process protection, even where their only significant connection to the U.S. is being

sued in our courts. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987).

Only four years after *Mezei*, the Court in *Reid v. Covert*, 354 U.S. 1 (1957), recognized that the constitutional right to jury trial encompassed U.S. citizens abroad, and expressly overturned the theory that constitutional protections stopped at the water's edge. *See* Neuman, *Strangers to the Constitution* at 93-94. Even the decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), held only that the Fourth Amendment did not apply to the seizure of an alien's property occurring entirely in another country, and Justice Kennedy's crucial fifth vote argued that the Constitution's reach abroad turned on whether such application in any given case was "impracticable and anomalous." *Id.* at 278 (Kennedy, J., concurring). All of these holdings directly contradict the proposition that the Constitution as a territorial matter is somehow inapplicable to parolees living in the United States, or even to aliens on U.S. soil at the border.

iii. This Court has Cabined the Plenary Power Doctrine Since *Mezei*.

In the past fifty years, the Court has also reined in the plenary power doctrine in immigration which reached its zenith in *Mezei*, by holding that Congress' immigration power "is subject to important constitutional limitations." *Zadvyadas,* 533 U.S. at 695 (citation omitted).

The late-nineteenth century doctrine that immigration was largely immune from judicial oversight, see cases discussed *supra*, at 13, originally derived from a misreading of decisions which stood only for the proposition that immigration was a national, rather than state, power in our federal system. *See* Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 179-95 (1987). This misreading reflected the

nationalist and racist impulses of a peculiarly unattractive era. *See* Cleveland, *supra*, at 263-65 & n.1767.

Mezei and the other Cold War immigration decisions represented the apex of the Court's application of this doctrine. Since *Mezei*, however, the Court has progressively recognized that the immigration power is substantially subject to constitutional constraints. The Court has applied ordinary due process analysis in the immigration context, *e.g., Landon v. Plasencia*, 459 U.S. 21, 34 (applying the *Mathews v. Eldridge* balancing test). The decision in *INS v. Chadha,* 462 U.S. 919 (1983), importantly invalidated a legislative veto over an immigration statute, holding that Congress' authority over immigration must be implemented through "a constitutionally permissible means." *Id.* at 941-942. In *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977), the Court acknowledged that there was some "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." And in *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), the Court applied "conventional equal protection scrutiny" to a citizenship statute. *Id.* at 72-73.[16]

All of the Court's holdings expanding due process protections, affirming the Constitution's application to aliens at the border and abroad, and restricting the plenary power doctrine have exacerbated the *Mezei* doctrine's incoherence in our constitutional system.

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[16] *See also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Power*, 1984 Sup. Ct. Rev. 255, 261-77 (examining and refuting rationales for the plenary power doctrine). For further critiques of the plenary power doctrine, see sources collected *supra*, at note 8.

C. Application of the Entry Fiction to Parolees Present in the United States with Substantial Connections to the Community Creates an Intolerable Constitutional Incoherence

The application of the entry fiction to deny due process protections to parolees who have substantial lawful connections to this country has stretched the entry fiction to the breaking point. The error began with the *Mezei* Court's refusal to recognize that any liberty interests arose from Mezei's lengthy U.S. residence. As Professor Hart observed, after *Mezei*

> a Mexican . . . who sneaks successfully across the Rio Grande is entitled to the full panoply of due process in his deportation. But . . . a duly admitted immigrant of twenty-five years' standing who has married an American wife and sired American children, who goes abroad as the law allows to visit a dying parent, and who then returns with passport and visa duly issued by an American consul, is entitled to nothing – and, indeed, may be detained on an island in New York harbor for the rest of his life if no other country can be found to take him.

Hart, *supra*, at 1395 (footnote omitted).

Parolees such as Benitez[17] have been released into the United States with the government's consent, but remain aliens on the threshold of entry in the eyes of the law for some limited purposes. *See* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 Sup. Ct. Rev. 47,

[17] Because Benitez proceeded *pro se* in the district court, the factual record regarding his circumstances is limited. Benitez was welcomed by the United States in 1980, has a U.S. citizen brother and sister-in-law in Florida, and has spent over thirteen years living and working freely in the U.S.

99-100. This practice has continued the rank fiction that, despite *Yick Wo's* promise that the Constitution protects all persons within the territorial jurisdiction, 118 U.S. at 369, parolees who have lived and moved within the United States with few restrictions remain "nonpersons" for purposes of the Due Process Clause. *See Jean v. Nelson*, 472 U.S. 846, 872 (1985) (Marshall, J., dissenting) ("The broad and ominous nature of the [*Mezei*] dicta . . . becomes clear when one realizes that they apply . . . to [paroled] aliens . . . who literally live within our midst, [but] . . . have no more rights than those in detention.").[18]

The absurdity of deeming parolees "outside" the United States for due process purposes was starkly illustrated in *United States ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2d Cir. 1958). That case addressed some of the 30,000 Hungarian refugees who had been paroled into the United States following the failed 1956 Hungarian revolution. The court refused to apply the entry fiction to hold that refugees who had come to the U.S. to flee Communism could be excluded, and their families divided, based on arbitrary or capricious grounds. *Id.* at 613-14. The Court accordingly required a hearing prior to the revocation of parole in order to avoid constitutional doubt. *Id.* at 614-15.

Moreover, the situation of immigrant parolees stands in stark contrast to parole in the criminal context, where

[18] Indeed, the entry fiction has been applied to allow the detention of paroled Mariel Cubans with hardened criminals in maximum security federal penitentiaries for 10 years or more, even though the aliens are not serving any criminal sentence. *E.g., Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1443–(9th Cir. 1995) (en banc) (upholding indefinite detention of Mariel Cuban detained in maximum security federal penitentiaries at Lompoc and Leavenworth); *but see Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (declining to apply *Mezei* to determine due process rights of parolees detained in maximum security facilities).

this Court has rejected the theory that parole is a matter of legislative grace that creates no liberty interests.[19] In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court recognized that the traditional application of the right/privilege distinction, which had viewed parole as a privilege rather than a vested right, was no longer dispositive. *Id.* at 481 (citing *Graham v. Richardson*, 403 U.S. 365 (1971)). Even if incarcerated persons did not have a substantial interest in being granted parole, 408 U.S. at 482 n.8, the "conditional liberty" they enjoyed once released on parole, *id.* at 480 and the accompanying community ties their freedom fostered, established interests sufficient to trigger due process protection. *Id.* at 482. *See also Gagnon v. Scarpelli*, 411 U.S. 778, 782 & n.4 (1973) (rejecting the principle that "probation is an 'act of grace'" and holding that revocation of probation implicates liberty interests requiring the protection of due process). It is untenable to hold that a convicted criminal released on parole acquires some liberty interests implicating due process, but that a paroled refugee does not.

Accordingly, the Government's effort to treat the Mariel Cubans as "entrant alien[s] or 'assimilated to [that] status' for constitutional purposes," *Mezei*, 345 U.S. at 214 (alteration in the original) (citation omitted), is intolerable in light of both their treatment by the United States and the developments in due process and other constitutional

[19] Criminal parole, like parole in the immigration context, traditionally has been considered "a correctional device authorizing service of sentence outside the penitentiary," in which the parolee is still "in custody" as a legal matter. *Morrissey*, 408 U.S. at 474-75 (citation omitted). *See also Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (immigrant parolees' status has not changed simply because their "prison bounds were enlarged"); *Zadvydas*, 533 U.S. at 696 (choice for aliens who cannot be returned is not between imprisonment and release, but between "imprisonment and supervision under release conditions that may not be violated").

jurisprudence since *Mezei*. Even if this Court were to conclude that application of the entry fiction might be appropriate for initial applicants under some circumstances, *Mezei* should not be read to withhold due process protection from the Petitioner here, who is both a quasi-refugee, as in the *Murff* case, and a long time U.S. resident.

III. THE COURT SHOULD REMEDY THE CONSTITUTIONAL INCOHERENCE CREATED BY *MEZEI* AND SUBJECT IMMIGRATION DETENTION DECISIONS TO ORDINARY *MATHEWS V. ELDRIDGE* SCRUTINY

Amici Law Professors urge that the Court take a step toward redressing the entry fiction's anomalous and discordant relationship to modern due process jurisprudence by adopting a graduated approach to the due process rights of aliens in removal proceedings under the *Mathews v. Eldridge* balancing test. 424 U.S. 319, 334-35 (1976). Such a test would recognize that due process applies across the board to aliens in the immigration context, as elsewhere, and that the appropriate question is not *whether* due process applies, but what process is due under any given circumstance. *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. at 481 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.")) (alteration in original).

Mathews, of course, requires the Court to balance the private interest affected by governmental action, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

In the immigration removal context, the *Mathews* test would determine what process was due by weighing both the alien's legal status and the nature and scope of her affiliations with the national community, against the government's legitimate interests. *See* Martin, *Graduated Application of Constitutional Protections for Aliens,* 2001 Sup. Ct. Rev. at 92-101. For example, with respect to legal status, aliens who had been lawfully admitted into the United States and maintained their lawful resident status would be recognized as having greater interests at stake in the balancing test than unadmitted aliens who were physically in the country, parolees, or aliens presenting at the border for the first time. With respect to community affiliation, aliens such as Mezei or parolees like Benitez with lengthy ties to the United States – who had worked, lived, and raised families in our community – would be recognized as having more substantial interests at stake than aliens who truly presented at the border for the first time. *See United States ex rel. Paktorovics v. Murff*, 260 F.2d at 613-14. But even aliens seeking initial entry would have some due process protection. T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 Geo. Immigr. L. J. 365, 375 (2002) (urging Court to reorient its constitutional analysis to hold that "due process applied in general to immigration proceedings (including to initial entrants at the border) and that the process that was due would depend on location, status, and other factors").

This approach would remedy the *Mezei* Court's errors. It would relieve the Court from drawing a fictitious and anachronistic line between whether the Constitution applies or does not apply to aliens in a given context. It would allow for accurate recognition of aliens' meaningful ties to the national community, through a flexible test for determining what process is due. Doing away with the fictitious divide between those who possess any constitutional rights and those who possess none also would be

consistent with the fact that physical abuse, torture, and civil detention of aliens by the government implicates liberty interests under the Due Process Clause, as the dissenters recognized in *Zadvydas*. *See* 533 U.S. at 721 (Kennedy, J., dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"); *id.* at 704 (Scalia, J., dissenting). The relevant question no longer would be whether treatment of an alien at the border implicates any constitutional rights, but what process is due in any particular circumstance.

To say that aliens are entitled to due process protection under the *Mathews* test, moreover, does not deny the weighty governmental interests at stake. The *Mathews* test traditionally has given deference to the government's unique interest in avoiding burdensome procedures. *Gilbert v. Homar*, 520 U.S. 924, 932-33 (1997); *Mathews*, 424 U.S. at 333-34. The government's interests in controlling this country's borders, enforcing our immigration laws, preserving the safety of the community, and other important governmental concerns likewise would be entitled to substantial weight. Thus, for aliens truly presenting at the border for the first time, the government's interests in controlling entry into the United States and in efficient administration, and the alien's less substantial interest in entering, would typically weigh in favor of limited procedural protections.

On the other hand, the interests of a paroled quasi-refugee such as Benitez, with lengthy ties to the national community, who was facing indefinite detention because he could not be removed, would weigh heavily and preclude detention in most circumstances, since the government's interest in effectuating its removal policy under these circumstances is "weak or nonexistent." *Zadvydas*, 533 U.S. at 690. In addition to the liberty interests implicated by the alien's lengthy affiliation with the United States, the alien's detention would trench on the most fundamental of liberty interests. *See id.* ("Freedom from

imprisonment . . . lies at the heart of the liberty that [the Due Process Clause] protects."); Martin, *Graduated Application of Constitutional Protections for Aliens,* 2001 Sup. Ct. Rev. at 124.

This is not to say, however, that lengthy detention in the removal context would never be available. Specific, articulable national security concerns or a high threat of dangerousness to the community would constitute significant governmental interests that could warrant substantial deprivations of liberty. *See Zadvydas,* 533 U.S. at 696 ("Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention."). The balancing test would have to be weighed heavily against preventative detention, however, and afford rigorous procedural protections. *See Zadvydas*, 533 U.S. at 691 (discussing strict procedural safeguards required for pretrial and preventive detention); *United States v. Salerno*, 481 U.S. 739, 750-52 (1987) (pretrial detention); *see also* Aleinikoff, *Detaining Plenary Power*, 16 Geo. Immigr. L. J. at 388 (arguing that lengthy detention of an alien subject to a final removal order must be based on specific and stringent protections for the detainee, with a high burden on the government for proving dangerousness (such as "clear and convincing" evidence), and a full opportunity to confront witnesses and have counsel, an independent adjudicator and judicial review). Since *Mezei*, the courts have developed procedural mechanisms for considering national security concerns of the type posed in that case. *See Rafeedie v. I.N.S.*, 880 F.2d 506, 523 (D.C. Cir. 1989) (applying *Mathews* test to deportation of returning resident alien denied entry on national security grounds). *See also* Brief of the American Bar Association *Amicus Curiae* in Support of Petitioner, Part III (discussing national security issues in *Mezei*). No specific articulable national security concerns, however, have been remotely implicated here.

In short, application of the ordinary due process balancing test to immigrant detainees would not deny the government power to control entry, or "to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." *Zadvydas*, 533 U.S. at 695. It would leave no "'unprotected spot in the Nation's armor.'" *Id.* at 695-96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. at 602).

Application of the *Mathews* balancing test is consistent with the progression of this Court's due process jurisprudence regarding aliens for many years. *See Landon v. Plasencia*, 459 U.S. at 34 (applying *Mathews* balancing test to determine due process rights of returning resident alien in exclusion proceedings, and weighing alien's interests at stake, including former presence in the United States, family ties and connections to the community, as well as government's interest in efficient procedures); *Mathews v. Diaz,* 426 U.S. 67, 78 (1976) (due process protection for aliens does not require "that all aliens must be placed in a single homogeneous legal classification"). As this Court noted in *Zadvydas*, "the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary depending upon *status and circumstance*." 533 U.S. at 693-94 (citations omitted) (emphasis added). *Benitez* offers the Court the opportunity to continue its forward steps in these cases by adopting a sensible framework yielding graduated constitutional protections for different categories of aliens, which considers "how the incidents of their status, coupled with the social reality they have experienced and the community ties they enjoy, affect the constitutional calculus." Martin, *Graduated Application of Constitutional Protections for Aliens,* 2001 Sup. Ct. Rev. at 137.

CONCLUSION

For the foregoing reasons, this Court should grant relief to petitioner.

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IN THE

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DANIEL BENITEZ,

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v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. EVEN WHEN IT WAS DECIDED, *MEZEI* RESTED ON WEAK AND HISTORICALLY UNFOUNDED REASONING	8
A. Before *Mezei*, Noncitizens Seeking Admission Were Entitled to Some Due Process	8
B. *Mezei* Wrongly Equated the Power to Exclude with the Power To Detain Indefinitely	13
II. THIS COURT'S SUBSEQUENT DECISIONS HAVE ERODED *MEZEI* AND CONFIRMED ITS PLACE AS AN ANOMALY IN THIS COURT'S DUE PROCESS JURISPRUDENCE	17
A. This Court's Substantive Due Process Jurisprudence Has Eroded the Foundations on which *Mezei* Purported to Rest	18
B. This Court's Subsequent Procedural Due Process Jurisprudence Has Similarly Undermined *Mezei*	23

TABLE OF CONTENTS—Continued

	Page
III. *MEZEI* SHOULD BE LIMITED TO ITS PARTICULAR FACTUAL AND HISTORICAL CONTEXT AND NOT EXPANDED TO ENCOMPASS PETITIONER'S INDEFINITE ADMINISTRATIVE DETENTION	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)	27
Addington v. Texas, 441 U.S. 418 (1979)	23, 24
Agostini v. Felton, 21 U.S. 203 (1997)	27
Ann Maria Garcia Lanza de Netto v. Uruguay, U.N. Doc. CCPR/C/OP/1 (1984)	22
Booth v. Maryland, 482 U.S. 496 (1987)	27
Brownlow v. Miers, 28 F.2d 653 (5th Cir. 1928)	10
Caranica v. Nagle, 28 F.2d 955 (9th Cir. 1928)	17
Carlson v. Landon, 342 U.S. 524 (1952)	23
Carmichael v. Wong Choon Ock, 119 F.2d 173 (9th Cir. 1941)	9
Chae Chan Ping v. United States, 130 U.S. 581 (1889)	12
Chieng Ah Sui v. McCoy, 239 U.S. 139 (1915)	10
Chin Yow v. United States, 208 U.S. 8 (1908)	8, 9
Chy Lung v. Freeman, 92 U.S. 275 (1875)	15
Crowell v. Benson, 285 U.S. 22 (1932)	22
Demore v. Kim, 538 U.S. 510, 123 S. Ct. 1708 (2003)	23
Dickerson v. United States, 530 U.S. 428 (2000)	27
Ex parte Joyce, 212 F. 282 (D. Mass. 1913)	10
Ex parte Perkov, 45 F. Supp. 864 (D. Cal. 1942)	17
Fiallo v. Bell, 430 U.S. 787 (1977)	5
Fong Tan Jew ex rel. Chin Hong Fun v. Tillinghast, 24 F.2d 632 (1st Cir. 1928)	9
Fong Yue Ting v. United States, 149 U.S. 698 (1893)	11, 12
Foucha v. Louisiana, 504 U.S. 71 (1992)	18, 20
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	23
Galvan v. Press, 347 U.S. 522 (1954)	13
Gegiow v. Uhl, 239 U.S. 3 (1915)	10
Gilbert v. Homar, 520 U.S. 924 (1997)	24

TABLE OF AUTHORITIES—Continued

	Page
Go Lun v. Nagle, 22 F.2d 246 (9th Cir. 1927)	9
Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)	24
Harisiades v. Shaughnessy, 342 U.S. 580 (1952)	28
In re Gault, 387 U.S. 1 (1967)	23
In re Krajcirovic, 87 F. Supp. 379 (D. Mass. 1949)	16
In re Oliver, 333 U.S. 257 (1948)	23
Jackson v. Indiana, 406 U.S. 715 (1972)	19
Jay v. Boyd, 351 U.S. 345 (1956)	29
Jean v. Nelson, 472 U.S. 846 (1985)	5
Johnson v. Damon ex rel. Leung Fook Yung, 16 F.2d 65 (1st Cir. 1926)	9
Jung Sam v. Haff, 116 F.2d 384 (9th Cir. 1940)	10
Kansas v. Hendricks, 521 U.S. 346 (1997)	19, 20, 21
Kaplan v. Tod, 267 U.S. 228 (1925)	14
Kwock Jan Fat v. White, 253 U.S. 454 (1920)	9
Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953)	25
Landon v. Plasencia, 459 U.S. 21 (1982)	*passim*
Leng May Ma v. Barber, 357 U.S. 185 (1958)	5, 14
Ludecke v. Watkins, 335 U.S. 160 (1948)	11, 28
Mathews v. Eldridge, 424 U.S. 319 (1976)	23, 24, 25
Malinsky v. New York, 324 U.S. 401 (1945)	23
Moraitis v. Delany, 46 F. Supp. 425 (D. Md. 1942)	17
Morrissey v. Brewer, 408 U.S. 471 (1972)	23
Nishimura Ekiu v. United States, 142 U.S. 651 (1892)	11, 14, 15
Payne v. Tennessee, 501 U.S. 808 (1992)	27
Petition of Brooks, 5 F.2d 238 (D. Mass. 1925)	16, 17
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)	27
Quinn v. France, 21 E.H.R.R. 529 (1996)	22

TABLE OF AUTHORITIES—Continued

	Page
Quon Quon Poy v. Johnson, 273 U.S. 352 (1927)	9
Reno v. Flores, 507 U.S. 292 (1993)	19, 20
Rosenberg v. Fleuti, 374 U.S. 449 (1963)	25
St. John v. McElroy, 917 F. Supp 243 (S.D.N.Y.1996)	21
Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993)	5
Schall v. Martin, 467 U.S. 253 (1984)	20
Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996)	27
Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)	*passim*
Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977)	24
South Carolina v. Gathers, 490 U.S. 805 (1989)	27
Staniszewski v. Watkins, 80 F. Supp. 132 (S.D.N.Y. 1948)	16
Superintendent, Mass. Correctional Institute at Walpole v. Hill, 472 U.S. 445 (1985)	21
Tang Tun v. Edsell, 223 U.S. 673 (1912)	9
Tod v. Waldman, 266 U.S. 113 (1924)	17
United States ex rel. Basile v. Curran, 298 F. 951 (S.D.N.Y. 1924)	10
United States ex rel. Chu Leung v. Shaughnessy, 88 F. Supp. 91 (S.D.N.Y. 1950)	16
United States ex rel. Janavaris v. Nicolls, 47 F. Supp. 201 (D. Mass. 1942)	17
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TABLE OF AUTHORITIES—Continued

	Page
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United States v. Chin Len, 187 F. 544 (2d Cir. 1911)	9
United States v. Holland-America Line, 212 F. 116 (2d Cir.), *aff'd* 235 U.S. 686 (1914)	14
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Wolck v. Weedin, 58 F.2d 928 (9th Cir. 1932)	17
Womah Mukong v. Cameroon, U.N. Doc. CCPR/C/51/D/458/1991 (1994)	22
Wong Wing v. United States, 163 U.S. 228 (1896)	15, 16, 19
Yamataya v. Fisher, 189 U.S. 86 (1903)	*passim*
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	15
Yung Yo v. United States, 185 U.S. 296 (1902)	11
Zadvydas v. Davis, 533 U.S. 678 (2001)	*passim*

STATUTES AND REGULATIONS

8 C.F.R. § 212.12 (2001)	21
8 U.S.C. § 1231(a)(6) (2001)	4, 26
Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898	14
Act of Feb. 5, 1917, ch. 29, 39 Stat. 874	14
Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084	14
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TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

	Page
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST [1]

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession. Its more than 400,000 members, from every state and territory

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* or its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students and even non-lawyer associates in allied fields.

The ABA has long been committed to protecting the constitutional and statutory rights of noncitizen detainees. For example, the ABA Commission on Immigration Policy, Practice and Pro Bono has assisted in organizing numerous *pro bono* immigration representation efforts and trained volunteer attorneys from the private bar to counsel immigrants in removal proceedings and to represent them on appeal. In August 2002, the ABA House of Delegates adopted a policy that "urges protection of the constitutional and statutory rights of immigration detainees . . . by [p]romptly charging detainees and releasing detainees when charges are not brought or removal orders are not effectuated within a constitutionally permissible time period." The policy also calls for the provision of prompt custody hearings for immigration detainees before immigration judges, accompanied by meaningful administrative review and judicial oversight.

The ABA has also been particularly concerned with ensuring the provision of the protections of the Due Process Clause to people threatened with criminal or administrative sanctions. Thus, for example, the ABA has recently considered such matters as the due process rights of defendants tried by military commissions,[2] including the right to counsel and the right to confront witnesses, and the right of noncitizen detainees to public deportation hearings with access to counsel.[3] This case raises questions of similar and substantial

[2] ABA *Recommendation 8C* (adopted Feb. 2002), available at <*http://www.abanet.org/leadership/2002_dailyjournal.pdf*>.

[3] ABA, *2001 Legislative and Governmental Priorities: Immigration* (policy adopted Feb. 2001) (Opposing the Use of Secret Evidence in Immigration Proceedings and Opposing Involuntary Transfer of Detained Immigrants and Asylum Seekers that Impede Representation), available at <*http://www.abanet.org/poladv/priorities/immigration/policies.html*>.

importance regarding the application of the Due Process Clause to inadmissible noncitizens whom the government seeks to subject to indefinite detention. Accordingly, the ABA appears as *amicus curiae* in this proceeding.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Indefinite executive detention poses one of the gravest dangers to a society that has historically valued the principles of due process and the rule of law. This Court must now decide whether the petitioner may be subjected to indefinite administrative detention, regardless of how long he has lived in the United States, or how deep his ties are to this country, based on the determination that he is "inadmissible" under the immigration statutes.

The government's contention that petitioner's potentially lifelong confinement poses "no due process problem," Brief for the Respondent on Petition for Writ of Certiorari at 16, rests on its interpretation of a single decision of this Court over a half-century ago, in a case that posed distinct national security concerns. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court upheld a noncitizen's indefinite detention at Ellis Island when no country would accept him following his exclusion without a hearing upon returning from an unauthorized nineteen-month trip behind the Iron Curtain. Under the government's interpretation of *Mezei*, however, any noncitizen denied admission under the immigration laws necessarily lacks "*any* [constitutional] right against continued immigration custody, even if such detention is indefinite and prolonged." Brief for Appellee to the Eleventh Circuit at 19-20 (emphasis added); *id.* at 22 (under *Mezei*, an inadmissible noncitizen has "no liberty interest" in remaining free of potentially lifelong confinement).

In claiming that *Mezei* is dispositive here, the government fails to apply the reasoning and force of this Court's recent

decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas*, the Court certainly noted that the long-standing distinction between noncitizens who have entered the United States and those who have not "made all the difference" in *Mezei*. 533 U.S. at 693. *Zadvydas*, however, qualified and limited *Mezei* by analytically separating a noncitizen's due process right to be free from indefinite administrative detention from his right to live in the United States under the immigration statutes. *Id.* at 695-96; *see also id.* at 703 (Scalia, J., dissenting) (*Zadvydas* petitioners claimed their right to be free from indefinite detention though they conceded that they "had no legal right to be here"); *id.* at 716 (Kennedy, J., dissenting) ("The majority's rule is not limited to aliens once lawfully admitted."). None of the cornerstone due process protections against indefinite detention relied on by the *Zadvydas* Court turn on a person's noncitizen status, let alone on statutory distinctions between the former immigration law categories of "deportation" and "exclusion" (now, together, known as "removal"). *Id.* at 690-92. Thus, although the petitioners in *Zadvydas* had lost the right to remain in the United States, their indefinite administrative detention pending removal under 8 U.S.C. § 1231(a)(6) raised such "a serious constitutional problem," *id.* at 690, that the Court imposed a reasonable time limit on this detention. *Id.* at 701. The petitioner in this matter is detained under the same overly broad statute which suffers from substantially the same procedural shortcomings. Under the framework set forth in *Zadvydas*, petitioner's "inadmissibility" for immigration purposes does not, then, place his continued detention entirely beyond the reach of the Due Process Clause.

As the government essentially acknowledges, this Court has never explicitly interpreted *Mezei* to sanction the indefinite detention of an inadmissible noncitizen pending removal from the United States. Brief for Appellee to the

Eleventh Circuit at 40.[4] To the contrary, the Court has consistently cited *Mezei* for the more limited—and here undisputed—propositions that Congress possesses broad powers to establish the criteria for admission to the country, *see, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977), and that noncitizens facing deportation have traditionally been entitled to greater constitutional protections than those facing exclusion. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

For the following reasons, *Mezei* should not now be extended beyond its specific factual and historical context to sanction the petitioner's indefinite administrative detention.

1. *Mezei* failed to consider a half-century of jurisprudence in stating that for noncitizens deemed inadmissible by the United States, due process is limited to whatever Congress deems it to be. *Mezei*, 345 U.S. at 212. After this Court's decision in *Yamataya v. Fisher*, 189 U.S. 86 (1903), first established that noncitizens facing removal were entitled to due process, courts required some due process protections even in exclusion cases. Indeed, the distinction between deportation and exclusion had never been the absolute, bright-line rule described in *Mezei* or in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), another national security exclusion case decided three years earlier. *Mezei*, moreover, failed to consider the right of noncitizens to be free from punishment without the protections of due process, as well as the need to impose limits on administrative detention pending removal from the country. As Justice Jackson pointed out in his powerful dissent, joined by Justice

[4] When a constitutional challenge to the detention of unadmitted noncitizens was last before this Court, the case was instead decided on nonconstitutional grounds. *Jean v. Nelson*, 472 U.S. 846 (1985) (equal protection challenge to policy of detention without parole for noncitizens seeking admission that discriminated on basis of race and national origin).

Frankfurter, *Mezei*'s overly broad sweep contravened hundreds of years of Anglo-American jurisprudence protecting against indefinite executive detention. 345 U.S. at 218-19 (Jackson, J., dissenting).

2. Although the Court did not need to address this issue in *Zadvydas*, 533 U.S. at 694, its analysis there makes clear that *Mezei* has been eroded by the Court's subsequent substantive and procedural due process jurisprudence. With respect to substantive due process, this Court has increasingly recognized the punitive consequences of indefinite regulatory detention. It has accordingly authorized such detention only in limited circumstances pursuant to a carefully defined scheme. As to procedural due process, this Court has abandoned the notion that any infringement on an individual's constitutional interests requires all the protections of a criminal trial, in favor of a flexible balancing test which evaluates the procedures provided by the government in light of the particular circumstances. The test considers the strengths of both the individual's liberty interest and the government's interest in efficient procedures. In the immigration context, this jurisprudence has prompted the Court to reject the notion that the so-called "entry fiction" is of constitutional significance. *E.g.*, *Landon v. Plasencia*, 459 U.S. 21 (1982). The flexibility of procedural due process now permits a conclusion that, while individuals standing at the border may possess a protected liberty interest in avoiding indefinite imprisonment, their status as inadmissible noncitizens, along with the government's interest in national security in a given case, are relevant to determining precisely what process is due.

3. *Mezei*, however, need not be overruled in order for petitioner to prevail, but only limited to its historical and factual context. *Mezei*, properly understood, demonstrates that the political branches possess broad powers in regulating immigration to the country, particularly in the specific instance of a national security case (a situation not presented here), and not that a noncitizen's potentially lifelong administrative detention remains outside the Due Process Clause because he has been formally deemed inadmissible, even if he has lived here for many years.

ARGUMENT

I. EVEN WHEN IT WAS DECIDED, *MEZEI* RESTED ON WEAK AND HISTORICALLY UNFOUNDED REASONING

The *Mezei* Court suggested that its decision fell within a long tradition of limiting constitutional rights to those noncitizens who had "passed through our gates" and entered the country. 345 U.S. at 212. But, the history of immigration law was far more nuanced than this and, if anything, *Mezei*, and its predecessor *Knauff*, *supra*,[5] represented departures from past principles rather than the culmination of a jurisprudential evolution. Specifically, *Knauff* and *Mezei* overstated the limits on the judiciary's role in ensuring at least some due process protection even in exclusion proceedings. Before *Mezei*, the Supreme Court had not held that the political branches' power to regulate immigration included the power to detain even inadmissible noncitizens indefinitely, and lower courts had consistently limited the length of time excludable noncitizens could be detained pending their removal. Thus, *Mezei* was incorrect to the extent that it concluded that inadmissible noncitizens remain outside the basic protections secured by the Due Process Clause.

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[5] In *Knauff*, the Court excluded the noncitizen wife of an American serviceman based on secret evidence and without a hearing. In reaching this result, the Court stated that because she had no right to admission, she also lacked the right to a hearing as a matter of due process. 338 U.S. at 543-44.

A. Before *Mezei*, Noncitizens Seeking Admission Were Entitled to Some Due Process.

Prior to *Knauff* and *Mezei*, the distinction between noncitizens who had entered the United States and those who remained outside it had not had been elevated to a bright-line constitutional rule, and "entry" had never been completely determinative of the fact or extent of protection under the Due Process Clause. For all noncitizens subject to removal, the government's "power to lay down general rules," even if "plenary," was not understood to include the "power to be arbitrary or to authorize administrative officials to be arbitrary," or to foreclose the federal courts from ensuring observance of the basic "constitutional guarantee of due process." *See* Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 *Harv. L. Rev.* 1362, 1390-91 (1953).

In *Yamataya*, *supra*, this Court first expressly recognized that noncitizens facing removal were entitled to due process, including notice of the charges against them and an opportunity to be heard. 189 U.S. at 100-01. There, the petitioner, who had been in the United States for merely four days, had never been lawfully admitted to the country and had "entered" subject to conditions that could be revoked. *Id.* at 87. The government claimed she could be removed because she was likely to become a public charge. *Id.* Acknowledging the finality of executive or administrative officers' factual findings as to admissibility, this Court also stated that such officers could *never* "disregard the fundamental principles that inhere in due process of law" with respect to their power "*to exclude* or expel" noncitizens. *Id.* at 100 (internal quotation marks omitted) (emphasis added).

Shortly after *Yamataya*, this Court began construing statutes in exclusion cases against the background of basic due process norms. In *Chin Yow v. United States*, 208 U.S. 8 (1908), it stated that provisions intended to ensure the

"finality" of fact-finding by administrative officials in exclusion proceedings were based on "the presupposition that the decision was after a hearing in good faith." *Id.* at 12; *see also* Kenneth C. Davis, *Administrative Law* § 237, at 828 (1951) (*Chin Yow* opened the door to "expanding judicial review" of exclusion hearings). A leading commentator at the time described the influence of *Yamataya* and *Chin Yow*, concluding that, together, they demonstrated that the Due Process Clause applied in both exclusion and deportation cases. Clement L. Bouvé, *A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States* 139-41 (1912). During the decades to follow, courts consistently construed provisions governing the exclusion of noncitizens to require a fair hearing and to prevent arbitrary action, not only in cases involving claims of United States citizenship[6] but in various other challenges to exclusion orders as well.[7]

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[6] *E.g.*, *Kwock Jan Fat v. White*, 253 U.S. 454, 459 (1920) (granting relief because procedures cannot be "unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law"); *Carmichael v. Wong Choon Ock*, 119 F.2d 173, 174 (9th Cir. 1941) (granting relief where "action of the immigration authorities was manifestly unfair"); *Fong Tan Jew ex rel. Chin Hong Fun v. Tillinghast*, 24 F.2d 632, 636 (1st Cir. 1928) (granting relief where record shows immigration officials' "fail[ed] to exercise their great power" in accordance with "'traditions and principles of free government'") (quoting *Kwock Jan Fat*, 253 U.S. at 464); *Go Lun v. Nagle*, 22 F.2d 246, 248 (9th Cir. 1927) (granting relief because "'[t]he mind revolts against [unfair hearings when] dealing with vital human rights'") (quoting *Johnson v. Damon ex rel. Leung Fook Yung*, 16 F.2d 65, 66 (1st Cir. 1926)); *United States v. Chin Len*, 187 F. 544, 550 (2d Cir. 1911) (granting relief because hearings were not "full, fair, and unbiased"); Gerald L. Neuman, "The Constitutional Requirement of 'Some Evidence,'" 25 *San Diego L. Rev.* 631, 641 (1988) (citing cases); *see also Quon Quon Poy v. Johnson*, 273 U.S. 352, 356 (1927) (affirming exclusion order where petitioner received fair hearing and there was "painstaking and impartial effort" to ascertain merits of his citizenship claim); *Tang Tun v. Edsell*, 223 U.S. 673, 681-82 (1912) (review of executive determination to ensure its authority was

Thus, there was no firm support for *Mezei*'s sweeping dictum upon which the government now relies so heavily—that

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"fairly exercised"); *Jung Sam v. Haff*, 116 F.2d 384, 387 (9th Cir. 1940) (petitioner entitled to "a fair hearing").

[7] *See, e.g., Gegiow v. Uhl*, 239 U.S. 3, 9-10 (1915) (reversing decision excluding noncitizens on ground they "were likely to become a public charge" because administrative official exceeded scope of his authority, resulting in "a decision without a fair hearing"); *United States ex rel. Jelic v. District Director of Immigration and Naturalization*, 106 F.2d 14, 19-20 (2d Cir. 1939) (reversing exclusion order based on, *inter alia*, lack of proper visa and false statements due to absence of "fair hearing" and "fair dealing"); *United States ex rel. Schachter v. Curran*, 4 F.2d 356, 358 (3rd Cir. 1925) (reversing exclusion order based on failure to establish sufficient residence in South America to entitle noncitizen to admission under immigration quota; stating that noncitizen "has rights . . . of which he cannot be deprived without due process of law and for the enforcement of which he may invoke judicial interference" and that administrative officials "have no power to dispense with the usual means of ascertaining the truth") (internal quotation marks omitted); *see also Chieng Ah Sui v. McCoy*, 239 U.S. 139, 142-44 (1915) (reviewing due process challenge to denial of admission of petitioner's minor sons under certificate of re-entry but denying relief on merits because petitioner had "abundant opportunity" for hearing and consideration of testimony); *Brownlow v. Miers*, 28 F.2d 653, 657-58 (5th Cir. 1928) (noncitizen excluded as stowaway and person likely to become a public charge not entitled to Sixth Amendment right to counsel but still entitled to "fair" hearing and "rights and privileges dictated by common justice"); *United States v. Petkos*, 214 F. 978, 980 (1st Cir. 1914) (noncitizen excluded on public health ground has right to "fair hearing [based] on lawful evidence"); *United States ex rel. Basile v. Curran*, 298 F. 951, 952 (S.D.N.Y. 1924) (Hand, J.) (reversing exclusion of noncitizen based on unfair hearing where administrative officials "dispense[d] with the usual means of ascertaining the truth" and failed "to proceed rationally"); *Ex parte Joyce*, 212 F. 282, 284-85 (D. Mass. 1913) (exclusion of noncitizen on public health ground would be "unfair . . . and ought not stand" if decision is based solely on medical report without consideration of other evidence of noncitizen's mental condition); "Developments in the Law—Immigration and Nationality," 66 *Harv. L. Rev.* 643, 671 (1953) [hereinafter "Developments in the Law"]; Hart, *supra*, at 1390-91 (in the half-century before *Mezei*, basic notions of due process and the rule of law "grew and flourished").

those "on the threshold of initial entry" possess only the due process "authorized by Congress," 345 U.S. at 212. For that proposition, the *Mezei* Court itself cited only one case other than *Knauff*—the Court's 1892 decision in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). *Nishimura Ekiu*, which predated *Yamataya* by over a decade, upheld the particular administrative scheme then provided by Congress to determine the admission of noncitizens, 142 U.S. at 664, but was eroded by subsequent decisions applying due process principles in the exclusion context.[8]

Knauff, likewise, fails to buttress the government's expansive interpretation of *Mezei*. Other than *Nishimura Ekiu*, *supra*, *Knauff* cited only three cases, all involving the deportation of noncitizens—*Yamataya*, *supra*; *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); and *Ludecke v. Watkins*, 335 U.S. 160 (1948). *See Knauff*, 338 U.S. at 543; *see also id.* at 544 (citing only *Nishimura Ekiu* and *Ludecke* in support of same proposition). *Yamataya*, as noted, explicitly recognized that a noncitizen facing removal was entitled to due process (a principle later extended to exclusion cases); the cited passage of *Fong Yue Ting*, another pre-*Yamataya* decision, merely established that the power to exclude and to expel noncitizens rested upon the same general foundation, *see* 149 U.S. at 713-14; and *Ludecke* involved the deportation of an "enemy alien" under the Alien Enemies Act of 1798, 1 Stat. 577, a context perhaps

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[8] Even in the earlier cases like *Nishimura Ekiu*, the Court had indicated its resolve to assure the lawful, constitutional application of immigration statutes to the exclusion of noncitizens. *E.g., Nishimura Ekiu*, 142 U.S. at 660 (judicial review of exclusion of noncitizens to ensure "the restraint is lawful"); *see also Yung Yo v. United States*, 185 U.S. 296, 305 (1902) (courts will review decision to exclude noncitizen where "required by the Constitution . . . to intervene"). However, in a manner "typical of the period," the Court in those very first cases was more focused on the placement of power in the appropriate branch than on procedural issues surrounding its exercise. Neuman, *supra*, at 637-38.

sufficiently related to a national security exclusion case like Knauff's or Mezei's, but not to removal proceedings generally. Indeed, even *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) ("The Chinese Exclusion Case"), which first described the political branches' "plenary power" over immigration, did not contemplate the extreme statement of the law which the government derives from *Mezei* and *Knauff*. 130 U.S. at 604 (federal power over immigration is limited "only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations"), *quoted in Zadvydas*, 533 U.S. at 695; *see also id.* (political branches' power over immigration "is subject to important constitutional limitations").

In short, *Mezei* does not support the sweeping proposition the government asserts, that unadmitted noncitizens are necessarily beyond all due process protections. Indeed, leading commentators at the time criticized *Mezei*'s unprecedented sweep. Professor Hart, for example, asserted that *Mezei*, along with *Knauff*, had ignored "thousands" of lower court cases, including exclusion cases, which had required basic due process guarantees. Hart, *supra* at 1390-91.[9] And, only the year after *Mezei*, this Court again

[9] *See also* Developments in the Law, *supra* at 675 (stating, pre-*Mezei*, that *Knauff* "ignore[d] judicial developments of the last fifty years" and that "implicit in this history of judicial intervention [was] a theory of due process, of judicial supervision of administrative action arising out of our pervading constitutional concept of a rule of law"); Case Notes, 27 *S. Cal. L. Rev.* 315, 321 (1954) ("If the decision in the *Mezei* case is based on the ground that there exists supreme sovereign authority over aliens excluded from the United States, unrestricted by any limitations whatsoever, it clearly transcends fundamental notions of justice and human decency."); Comments, 34 *B. Univ. L. Rev.* 85, 88 (1954) (*Knauff* and *Mezei* "reversed th[e] trend" of granting increasing due process rights to noncitizens seeking admission). More contemporary commentators have concurred with Hart's basic critique of *Knauff* and *Mezei*. *E.g.*, T. Alexander Aleinikoff, "Aliens, Due Process and 'Community Ties': A Response to

confirmed that despite Congress' broad power to formulate immigration "[p]olicies pertaining to the entry of aliens and their right to remain here," the "Executive Branch of the Government must respect the procedural safeguards of due process" in its "enforcement of those policies." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Nonetheless, in light of the government's argument here, the Court is now called upon to clarify that, while a noncitizen's formal status as an entrant to this country may be relevant to determining his appropriate treatment, it does not completely deprive him of the protections of the Due Process Clause.

B. *Mezei* Wrongly Equated the Power to Exclude with the Power To Detain Indefinitely.

In determining that the petitioner's potentially lifelong administrative detention did not deprive him of any constitutional right, *Mezei* conflated Congress' broad power to determine admissibility with the distinct power to detain those found to be inadmissible beyond the temporary period necessary to effectuate their removal. Specifically, the Court noted that temporary arrangements authorizing a noncitizen's transfer from ship to shore "bestowed no additional rights" and did not "affect[ ] an alien's status." 345 U.S. at 215. Here, it relied on precedents addressing the "entry fiction"[10]—the notion that the fact of physical presence in the

Martin," 44 *U. Pitt. L. Rev.* 237, 237 (1983) ("Occasionally [as in *Knauff* and *Mezei*], the Supreme Court makes a statement about the Constitution that simply cannot be true."); David A. Martin, "Due Process and Membership in the National Community: Political Asylum and Beyond," 44 *U. Pitt. L. Rev.* 165, 174-75 (1983) (until *Knauff*, federal courts attempted to ensure immigration officers acted in accordance with basic ideas of fairness and this Court "unmistakably asserted an independent judicial role in evaluating the adequacy of the hearing").

[10] The "entry fiction" originally derived from late nineteenth and early twentieth century statutes permitting immigration inspectors to order the temporary transfer of a noncitizen from a vessel to shore for inspection

United States did not necessarily constitute an "entry," and that such persons legally remained at the border for purposes of admission. 345 U.S. at 212.[11] *Mezei*, however, stretched

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because of the practical difficulties associated with completing all immigration inspections on board. These statutes provided that this transfer would not be considered "a landing" for immigration law purposes. *See* Act of Feb. 5, 1917, ch. 29, § 15, 39 Stat. 874, 885; Act of Feb. 20, 1907, ch. 1134, § 16, 34 Stat. 898, 903; Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085-86. The "landing" provisions represented a pragmatic legislative response to the complexities of administering the nation's immigration laws during the early decades of federal immigration regulation. They helped shield shipping carriers from criminal liability for permitting noncitizens to disembark at the request of immigration officers, in contrast to their unquestioned liability for other, unauthorized "landings." *E.g.*, *Warren v. United States*, 58 F. 559, 561 (1st Cir. 1893) (describing sanctions on carriers). The "landing" provisions also gave immigration officials the flexibility to examine arriving noncitizens in their own special facilities like the buildings on Ellis Island, without relieving shipping companies of their responsibility for the costs and transportation of those subsequently deemed ineligible for admission. *See, e.g.*, *United States v. Holland-America Line*, 212 F. 116, 118-19 (2d Cir.) ("The legal fiction that the immigrants were not landed until they had been admitted . . . . only negatived any presumption that, because of actual landing, they had been admitted or that the defendant's obligation to return them if ordered to be deported was at an end.") (discussing "landing" provision of the 1907 Act), *aff'd* 235 U.S. 686 (1914).

[11] For example, the *Mezei* Court cited *Kaplan v. Tod*, 267 U.S. 228 (1925), which had held that a noncitizen could still be excluded despite being temporarily released into the country as a minor nine years earlier. *Id.* at 230 (noncitizen never "dwelt" in United States within meaning of naturalization statute based on prior physical presence); *see also Nishimura Ekiu*, 142 U.S. at 661-62 (noncitizen's transfer to shore pending determination of eligibility for admission "left her in the same position, so far as regarded her right to land in the United States, as if she had never been removed from the steam-ship," and did not alter power of government to exclude her as a person likely to become a public charge). Similarly, the Court subsequently determined that temporary parole into the United States does not entitle a noncitizen to seek the statutory benefit of withholding of deportation. *See Leng May Ma*, 357 U.S. at 188-89. None of these cases addressed the constitutional ramifications of the

these authorities to support the far more expansive proposition that the power to regulate immigration also included the power to detain a noncitizen indefinitely if he was found inadmissible, or otherwise to define completely the constitutional rights of such persons.

Indeed, in upholding the petitioner's indefinite administrative detention, *Mezei* failed to take into account basic principles governing the fundamental rights of noncitizens. It had already long been established that the Fourteenth Amendment's protections "are universal in their application, to all persons within the territorial jurisdiction" of the United States "without regard to any differences of . . . nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).[12] It was similarly well established that the government's authority to regulate immigration did not authorize executive imprisonment of unlawful entrants. *Wong Wing v. United States*, 163 U.S. 228 (1896). In *Wong Wing*, this Court had declared unconstitutional a provision of an immigration statute imposing punishment of up to one year's hard labor on noncitizens "not lawfully entitled to be or remain in the United States." Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25.[13] Although recognizing that Congress enjoyed broad power to exclude and expel

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potentially lifelong confinement of a noncitizen denied admission, a situation that, even under the government's view, would have posed distinct questions. *See, e.g.*, Brief for the Appellee, at 13, *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (No. 1393) ("[Ekiu] may at any moment free herself if she will return to the country of her sovereign, or will leave the United States. She is *withheld from coming in*.") (emphasis added).

[12] The issue of the Constitution's territorial scope was not presented in *Yick Wo*. However, in support of its equal protection analysis, the *Yick Wo* Court cited *Chy Lung v. Freeman*, 92 U.S. 275 (1875), a case reversing the exclusion of a noncitizen situated on a boat in the harbor outside San Francisco. *Yick Wo*, 118 U.S. at 374.

[13] The statute was formally entitled "An act to prohibit the coming of Chinese persons into the United States."

"undesirable aliens" and to impose "temporary confinement" to carry out this purpose, *Wong Wing* 163 U.S. at 235, the Court held that the Constitution limited the authority of Congress "to declare unlawful residence within this country to be an infamous crime, punishable by deprivation of liberty and property." *Id.* at 237. The specific facts of *Wong Wing* involved deportation, but the elementary principles of due process described by the Court encompassed exclusion as well. *Id.* at 235 ("The question now presented is whether congress can promote its policy [embodied in the Chinese exclusion acts] by adding to its provisions for their *exclusion* and expulsion punishment by imprisonment at hard labor.") (emphasis added); *see also id.* (contrasting temporary detention pending "[p]roceedings *to exclude or expel*" with unlawful sanction of imprisonment imposed on Wong Wing) (emphasis added). Thus, a noncitizen's violation of the immigration laws, subjecting him to removal from the country, did not deny him that most basic due process right against unlawful imprisonment. *Id.* at 237-38.

Consistent with these fundamental norms, courts before *Mezei* had typically limited the length of a noncitizen's detention pending exclusion from the United States. *See, e.g.*, *Staniszewski v. Watkins*, 80 F. Supp. 132, 135 (S.D.N.Y. 1948) (ordering release of noncitizen seaman detained at Ellis Island for almost seven months); *In re Krajcirovic*, 87 F. Supp. 379, 382 (D. Mass. 1949) (limiting immigration detention of noncitizen stowaway seized at the border to two months from date of court's decision; stating that "wherever the Constitution of the United States is applicable, and that includes ports of entry, an alien as well as a citizen is guaranteed that he will not be deprived of his liberty without due process of law"); *see also United States ex rel. Chu Leung v. Shaughnessy*, 88 F. Supp. 91, 92 (S.D.N.Y. 1950) (suggesting reasonable limit on time noncitizen may be detained even where exclusion not possible to effectuate); *Petition of Brooks*, 5 F.2d 238, 239 (D. Mass. 1925) (power to exclude

and deport does not include power to detain indefinitely); *cf. Tod v. Waldman*, 266 U.S. 113, 120-21 (1924) (ordering noncitizens' discharge from detention if administrative appeal of denial of admission is not "grant[ed] and hear[d]" within thirty days after issuance of Court's mandate).[14]

In sum, before 1953, courts not only applied the basic principles of due process to the procedures used to determine the admissibility of entering noncitizens, but also limited the length of time a noncitizen could be detained pending removal from the country. *Mezei*'s dictum to the contrary broke faith with this tradition and with the cases that established and affirmed it.

II. THIS COURT'S SUBSEQUENT DECISIONS HAVE ERODED *MEZEI* AND CONFIRMED ITS PLACE AS AN ANOMALY IN THIS COURT'S DUE PROCESS JURISPRUDENCE

While *Mezei* eschewed contemporary notions of due process when decided, it is even more anomalous today, given this Court's subsequent due process jurisprudence. Since *Mezei*, this Court has developed a more sophisticated and rigorous

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[14] Courts had similarly limited the period of detention pending deportation. *See, e.g., Wolck v. Weedin*, 58 F.2d 928, 930-31 (9th Cir. 1932) (ordering noncitizen's release if government could not effect his deportation within thirty days); *Caranica v. Nagle*, 28 F.2d 955, 957 (9th Cir. 1928) (implying existence of constitutional limitations on length of detention pending deportation; rejecting that period of two months was unconstitutional); *United States ex rel. Ross v. Wallis*, 279 F. 401, 403-04 (2d Cir. 1922) (noncitizen could not be detained more than four months if executive could not effect his deportation); *United States ex rel. Janavaris v. Nicolls*, 47 F. Supp. 201, 203-04 (D. Mass. 1942) (ordering release of seaman held for five months because deportation could not be effected in the foreseeable future); *Ex parte Perkov*, 45 F. Supp. 864, 867 (D. Cal. 1942) ("An alien taken into custody cannot be held indefinitely."); *cf. Moraitis v. Delany*, 46 F. Supp. 425, 432 (D. Md. 1942) (detention for longer than four months, including up to one year, was reasonable during wartime).

understanding of the relationship between regulatory and criminal sanctions that recognizes that the former can, in fact, be punitive. The Court's substantive due process jurisprudence also recognizes that an individual may be subjected to regulatory detention only in narrow circumstances under a carefully drawn scheme. And, further eroding *Mezei*'s rationale, this Court's procedural due process jurisprudence has grown and flourished through the development of a sensitive balancing test which acknowledges that the nature of constitutionally required procedures varies depending on the strength of the individual and governmental interests at stake, as well as the value of additional safeguards in producing more accurate results. These developments provide further reason to reject the interpretation of *Mezei* offered by the government.

A. This Court's Substantive Due Process Jurisprudence Has Eroded the Foundations on which *Mezei* Purported to Rest

Since *Mezei*, this Court has repeatedly emphasized that the core purpose of the Due Process Clause is to protect against unlawful detention, whatever the context. *See, e.g.*, *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *see also United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

This Court has also developed a more carefully calibrated framework to assess the constitutional implications of regulatory detention in particular. At the time *Mezei* was decided, the Court lacked a test that could make the necessary

distinctions between regulatory and punitive sanctions. Charles D. Weisselberg, "The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei," 143 *U. Pa. L. Rev.* 933, 991-92 (1995). Thus, only more traditional "criminal" sanctions, such as imprisonment for hard labor, *see Wong Wing*, *supra*, would have seemed punitive to the justices on the *Mezei* Court, who viewed that case through the prism of proper procedures without considering how indefinite detention itself could violate due process. *Compare Mezei*, 345 U.S. at 207 ("The issue is whether the Attorney General's *continued exclusion of respondent without a hearing* amounts to an unlawful detention.") (emphasis added), *with Zadvydas*, 533 U.S. at 690-92 (indefinite detention under 8 U.S.C. § 1231(a)(6) "would raise a serious constitutional problem" in light of last three decades' of due process jurisprudence). The principle that all noncitizens are protected from unlawful confinement by the Due Process Clause has not changed since *Wong Wing*; it is only this Court's understanding of what makes that confinement unlawful that has evolved.

Increasingly sensitive to the dangers posed by regulatory detention, this Court has imposed temporal limits on that detention, which may last only for as long as the stated purpose of the commitment remains. *See, e.g.*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("[T]he nature and duration of commitment must bear some reasonable relation to the purpose for which the individual is committed."). In *Jackson*, the Court held that criminal defendants may not be committed to custody as incompetent to stand trial for more than the period reasonably necessary to determine whether they will become competent in the foreseeable future. *Id.*; *see also Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997) (sexually violent predators committed because their mental abnormality makes them a threat to others may be incapacitated only for as long as that stated purpose remains); *Reno v. Flores*, 507 U.S. 292, 314 (1993) (upholding INS

policy of maintaining custody of noncitizen juveniles pending deportation proceedings where "period of custody [was] inherently limited by the pending deportation hearing" and was expected to last "an average of only 30 days"). And, in upholding the pretrial detention of a narrow class of individuals in *Salerno*, *supra*, this Court emphasized the "stringent time limitations" on that detention. 481 U.S. at 747; *see also Schall v. Martin*, 467 U.S. 253, 269 (1984) (pretrial detention of alleged juvenile delinquents "strictly limited in time").

At the same time, this Court has required that regulatory detention be limited to narrow classes of individuals. In *Foucha*, *supra*, it declared unconstitutional the continued detention of a person acquitted by reason of insanity under a regime that was neither "sharply focused" nor "carefully limited." 504 U.S. at 81. In contrast, the bail reform statute upheld in *Salerno* "carefully limit[ed]" pretrial detention to "the most serious of crimes," 481 U.S. at 747, and the Court underscored that the government bore the burden of proof in "a full-blown adversary hearing" to demonstrate by "clear and convincing evidence" that an individual fell within that narrow class. *Id.* at 750. Similarly, the civil commitment scheme upheld in *Hendricks*, *supra*, strictly limited confinement to those with "a volitional impairment rendering them dangerous beyond their control" and required the government to demonstrate beyond a reasonable doubt that a particular individual fell within that narrowly defined category. 521 U.S. at 352, 358. Thus, the Court has substantially restricted the availability and duration of regulatory confinement in the years since it decided *Mezei*.

In *Zadvydas*, this Court established that its substantive due process jurisprudence provided the appropriate framework for evaluating the administrative detention of noncitizens pending removal from the United States. It concluded that a noncitizen's right to be present in the United States under the immigration statutes was distinct, as a matter of due process, from his right to be free of indefinite administrative detention.

The government thus cannot contend today, as it did in *Mezei*, that a noncitizen's detention, no matter how long, is lawful simply because it "'is itself the effectuation of the exclusion order.'" *Mezei*, 345 U.S. at 221 (Jackson, J., dissenting) (quoting government's argument). As the *Zadvydas* Court emphasized, not only must preventative detention based on dangerousness be limited to "specially dangerous individuals" but, when such detention is of potentially indefinite duration, it must be accompanied "by some other special circumstance, such as mental illness, that helps to create the danger." 533 U.S. at 690-91; *see also Hendricks*, 521 U.S. at 357 (potentially indefinite commitment requires proof not only of "a mere predisposition to violence" but also "evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated").[15] Under the principles of *Zadvydas*

[15] The Court further stressed that, even when these rare conditions are satisfied by a narrowly drawn detention scheme, the government must also provide "strong procedural protections." *Zadvydas*, 533 U.S. at 690-91. Such protections are gravely lacking under the current administrative detention scheme. For example, the regulations governing the availability of supervised release to petitioner and other Mariel Cubans do not provide for: counsel at the government's expense; the right to call or examine witnesses; the right to examine the evidence considered by the government; an adversarial process; or placement of the burden of proof on the government. 8 C.F.R. § 212.12(d) (2001). Nor do they provide for a decision by an impartial adjudicator. *Id.* § 212(b)-(d); *see also St. John v. McElory*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) (INS officials not impartial decisionmakers as to noncitizens' detention). The current detention scheme also fails to provide for judicial review, raising the same serious constitutional question a substantially similar administrative scheme did in *Zadvydas*. *See* 533 U.S. at 692 ("[T]he Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'") (quoting *Superintendent, Mass. Correctional Institute at Walpole v. Hill*, 472 U.S. 445, 450 (1985)); *see also id.* ("'[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial

and the Court's post-*Mezei* substantive due process jurisprudence, the determination that a noncitizen is "inadmissible" under the immigration statutes does not remove his indefinite administrative confinement—in a federal prison on U.S. soil—from the fundamental protections of the Due Process Clause.[16] Accordingly, petitioner's detention raises precisely

process.'") (quoting *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting)).

[16] *Mezei*, as interpreted by the government, is also at odds with international human rights law prohibiting arbitrary detention. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948), art. 9 ("[n]o one shall be subjected to arbitrary arrest, detention or exile"); Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), *adopted* Dec. 19, 1966, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *ratified by* the United States in 1992. Moreover, the Human Rights Committee, established to monitor compliance with the ICCPR, has interpreted "arbitrariness" as not to be equated exclusively with "against the law"; rather, it must be interpreted more broadly to include elements of "inappropriateness, justice, lack of predictability, or lack of due process." *Womah Mukong v. Cameroon*, Human Rights Committee, Communication No. 458/1991, CCPR/C/51/D/458/1991 at ¶ 9.8 (1994); *see also Ann Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977, U.N. Doc. CCPR/C/OP/1 at ¶¶ 14-15 (1984) (finding violation of Article 9(1) of the ICCPR where two individuals were detained for several months after their sentences of imprisonment had been fully served). The European Court of Human Rights has applied similar principles to limit the length of detention. *See, e.g., Quinn v. France*, 21 E.H.R.R. 529 (1996) (detention pending extradition cannot exceed a reasonable time; finding 18 months' detention to violate European Convention for the Protection of Human Rights and Fundamental Norms and its prohibition against arbitrary detention). The United States has been specifically criticized by the Human Rights Committee for its treatment of excludable noncitizens. *See* Concluding Observations of the Human Rights Committee: United States of America 3/10/1995, U.N. Doc. CCPR/C/79/Add.50A/50/40 at ¶ 283 (1995) ("[The] Committee is concerned that excludable aliens are dealt with by lower standards of due process than other aliens and, in particular, that those who cannot be deported or extradited may be held in detention indefinitely.").

the same "serious constitutional problem" as did the petitioners' detention in *Zadvydas*.[17] It should likewise be prohibited.

B. This Court's Subsequent Procedural Due Process Jurisprudence Has Similarly Undermined *Mezei*.

Procedural due process "is a principle basic to our society." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Malinski v. New York*, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring) ("The safeguards of 'due process of law' . . . summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people."). The Due Process Clause significantly limits the power of the government not only in criminal trials but in all instances in which an individual may be deprived of his liberty. *See, e.g., Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment); *In re Gault*, 387 U.S. 1, 31-32 (1967) (juvenile delinquency); *In re Oliver*, 333 U.S. 257, 274-75 (1948) (contempt of court); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (revocation of parole).

[17] This Court's more recent decision in *Demore v. Kim*, 538 U.S. 510, 123 S. Ct. 1708 (2003), provides further support for petitioner's due process claim. In upholding the mandatory detention of criminal noncitizens pending removal proceedings, *Kim* distinguished *Zadvydas* on two principal grounds, both of which are equally pertinent here. First, as in *Zadvydas*, removal is "'no longer practically obtainable,'" and thus petitioner's detention no longer "serve[s] its purported immigration purpose." *Kim*, 123 S. Ct. at 1719 (quoting *Zadvydas*, 533 U.S. at 690). Second, and again as in *Zadvydas*, the detention is "'indefinite'" and "'potentially permanent.'" *Id.* at 1720 (quoting *Zadvydas*, 533 U.S. at 690-91); *see also Carlson v. Landon*, 342 U.S. 524, 546 (1952) (distinguishing unique "problem" caused by an "unusual delay" in deportation hearings in upholding policy denying bail to certain noncitizens pending deportation proceedings).

However, because this Court has exercised great care in recent decades to accommodate important government interests when determining what procedures are due in a given situation, a decision confirming that the detention of inadmissible noncitizens like petitioner are within the protections of the Due Process Clause would not threaten those interests.

At least since its 1976 decision in *Eldridge*, *supra*, the Court has made clear that due process is a flexible concept and that courts must consider the government's interest in avoiding burdensome procedures, as well as the value of additional safeguards in producing an accurate result. *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 932-33 (1997); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 852 n.59 (1977); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 15-16 (1979); *Addington*, 441 U.S. at 425; *see also* Martin, *supra*, at 167 ("The Supreme Court's approach to due process has undergone a virtual revolution since [*Knauff* and *Mezei*]."). Because the Due Process Clause requires a balancing test that accommodates governmental interests when determining whether particular procedures are needed, *Eldridge*, 424 U.S. at 335, courts can today consider and, when appropriate, defer to the unique national security interests that may arise in given situations during the course of the government's administration of the nation's immigration laws. *Cf. Mezei*, 345 U.S. at 214 (noting that Mezei "simply left the United States and remained behind the Iron Curtain for 19 months" without seeking security clearance or documentation before his departure).

This Court has applied these principles in the immigration context even as to admission. Specifically, in *Landon v. Plasencia*, *supra*, the Court applied the Due Process Clause to a returning resident—precisely the type of noncitizen to whom *Mezei* refused any due process—subject to exclusion

for illegally smuggling other noncitizens into the country.[18] Due process, the Court concluded, did not turn on whether the proceedings were classified as "exclusion" or "deportation"—by statute, the admissibility of a returning resident still had to be determined in an exclusion proceeding, 459 U.S. at 28—but rather on other factors, such as the person's former presence in the United States and ties to the community, as well as the government's interest in efficient procedures. *Id.* at 32-33. *Plasencia* expressly narrowed *Mezei* with respect to a noncitizen's right to admission, stating that "[*Mezei*] did not suggest that no returning resident alien has a right to due process," but that Mezei himself, based on his extended departure, had no such right with respect to his admission upon return to the United States. *Id.* at 33-34. Recognizing instead that Plasencia possessed a "weighty" liberty interest in remaining in the United States even though she was still considered to be at the border and subject to exclusion proceedings under the immigration statutes, the Court determined that the three-part *Eldridge* balancing test should be applied on remand to determine precisely what process she was due. *Id.* at 34-37. This test thus provides a more flexible and yet precise framework by which the judiciary may continue to fulfill its traditional role with respect to the

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[18] Prior to *Plasencia*, this Court had avoided the rigid distinction between deportation and exclusion suggested by *Knauff* and *Mezei* through statutory interpretation. *See Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963) (narrowly construing "entry" to exclude "innocent, casual, and brief" trip abroad by petitioner, thus not subjecting him to exclusion, contrary to the government's assertions); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) ("assimilat[ing] petitioner's status to that of an alien continuously residing and physically present in the United States" in case of noncitizen seaman on American merchant vessel excluded without a hearing). While the holding in *Chew* was statutory—that the administrative regulations permitting exclusion without a hearing on national security grounds did not apply to his particular case—*Plasencia* subsequently referred to it as a "rationale . . . of constitutional law." 459 U.S. at 31.

regulation of the nation's borders—a "limited" but important one, ensuring "the procedures meet the essential standard of fairness" in light of "the particular circumstances." *Id.* at 34-35; *see also Zadvydas*, 533 U.S. at 694 (Due Process Clause applies to all noncitizens subject to a final order of deportation, "though the nature of that protection may vary depending upon the status and circumstance") (citing *Plasencia*, 459 U.S. at 32-34).

In sum, the Court's post-*Mezei* jurisprudence makes clear that the government's sweeping interpretation of *Mezei* is not only wrong but unnecessary.[19] Acknowledging the traditional liberty interest in avoiding detention, particularly indefinite detention pending removal based on inadmissibility, can, under the flexible test that has evolved, co-exist with the government's interest in national security. Quite simply, *Mezei* is, today, a dangerous anachronism.

III. *MEZEI* SHOULD BE LIMITED TO ITS PARTICULAR FACTUAL AND HISTORICAL CONTEXT AND NOT EXPANDED TO ENCOMPASS PETITIONER'S INDEFINITE ADMINISTRATIVE DETENTION

This Court need not, however, overrule *Mezei* to determine that petitioner's continued detention under 8 U.S.C. § 1231(a)(6) "would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 690. *Mezei* should instead be interpreted in light of its particular factual and historical context; thus understood, it does not yield the unjustifiably

[19] Moreover, from the perspective of enforcement of the immigration laws, interpreting *Knauff* and *Mezei* broadly to deny any constitutional rights to noncitizens at the border is counterproductive, foreclosing the gradual evolution of due process protections and requiring courts confronted with "outrageous" government conduct "to leap in with both feet, demanding costly and intrusive procedures that make control of the borders and deportation of aliens considerably more difficult." Aleinikoff, *supra*, at 259.

sweeping statement of constitutional law which the government now proposes.[20]

As in *Knauff*, the Court in *Mezei* repeatedly emphasized that its decision was authorized by national emergency provisions and animated by national security considerations. Specifically, Mezei's exclusion was grounded on wartime statutes permitting the President to impose additional restrictions on the entry and departure of noncitizens from the country "'[w]hen the United States is at war or during the existence of the national emergency.'" *Mezei*, 345 U.S. at 210-11 (quoting Act of May 22, 1918, c.81, § 1, 40 Stat. 559, as amended by Act of June 21, 1941, c.1, § 1, 55 Stat. 252); *see also Knauff*, 338 U.S. at 540-42 (same); Brief for the Respondent in Opposition, at 11 *United States ex rel. Knauff*

[20] Although *amicus* urges the Court to limit *Mezei* to its facts, overruling *Mezei* would be consistent with the principles of *stare decisis*. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (*stare decisis* is a "principle of policy," not an "inexorable command"); *see also Agostini v. Felton*, 521 U.S. 203, 235-36 (1997). By overruling *Mezei*, this Court would restore its jurisprudence on a previously long-established point of constitutional law. *See generally*, Hart, *supra*, at 1390-91; *Yamataya* 189 U.S. at 100; *cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 233-34 (1995). This step would also be consistent with the Court's post-*Mezei* recognition that administrative detention implicates the Due Process Clause, *supra*, at II.A, and its relaxation of *Mezei*'s bright-line "entry" distinction in *Plasencia* and *Fleuti*, *supra*, at II.B. Additionally, this Court decided *Mezei* by the narrowest of margins over spirited dissents that challenged the basic premises of the majority; like the decisions in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), both of which this Court overruled in *Payne v. Tennessee*, 501 U.S. 808 (1992). Overruling *Mezei* would also not harm any entity's reliance interests. *See, e.g., Adarand*, 515 U.S. at 233; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992). And *Mezei* is fundamentally distinct from decisions such as *Roe v. Wade* and *Miranda v. Arizona*, which this Court has declined to reconsider in part because they, unlike *Mezei*, have become incorporated into the fabric of society. *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Casey*, 505 U.S. at 854.

v. Shaughnessy, 338 U.S. 537 (1950) (No. 54) ("The United States still is at war.") Pursuant to this authority, the Attorney General, acting for the President, could not only exclude noncitizens whose "entry would be prejudicial to the interest of the United States," but could do so without a hearing in the "special case" where that exclusion was based on "information of a confidential nature, the disclosure of which would [itself] be prejudicial to the public interest." *Mezei*, 345 U.S. at 210-11 & nn. 7 & 8 (internal quotation marks and citations omitted).

In denying Mezei relief, the Court expressly distinguished a noncitizen's temporary detention pending "expeditious consummation of deportation proceedings" from "[a]n exclusion proceeding *grounded on danger to the national security*," 345 U.S. at 215-16 (emphasis added), noting that "to admit an alien barred from entry *on security grounds* nullifies the very purpose of the exclusion proceeding." *Id.* at 216 (emphasis added); *see also id.* at 217 (Black, J., dissenting) (detention based on Attorney General's assertion that it "would be dangerous to the Nation's security to let Mezei go home even temporarily on bail"). The Court's reliance not only on *Knauff*,[21] but also on *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (deportation of former Communist Party members under Internal Security Act), and *Ludecke*, *supra* (deportation of "enemy alien"), further underscores that *Mezei* turned on the special facts and circumstances of national security cases rather than some sweeping and inflexible principle meant to govern the prolonged detention of all

[21] The *Knauff* Court emphasized similar concerns. *E.g.*, 338 U.S. at 544 (denial of hearing because "disclosure of information on which [Attorney General] based . . . opinion [to exclude petitioner] would itself endanger the public security"); *id.* at 546 (no power to retry Attorney General's determination to exclude petitioner without a hearing "during the [present] national emergency").

unadmitted noncitizens. Indeed, the government had expressly argued that because the decision regarding Mezei specifically involved national security interests, his case presented an exception to the general rule of releasing noncitizens from unreasonable detention pending their deportation or exclusion. Brief for the Petitioner, at 32, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (No. 139) (invoking *Korematsu v. United States*, 323 U.S. 214, 219 (1944), to argue, in light of "the present period of national peril," that "hardships" such as Mezei's detention, "are part of war, and war is an aggregation of hardships"); *id.* at 29 (comparing Mezei's confinement to "an alien enemy interned during time of war"); *id.* (justifying Mezei's continued detention on ground that his exclusion was "for reasons of internal security"); *id.* at 29-30 (continued exclusion and detention of Mezei may continue until "his entry no longer will imperil the national safety" or "until the conclusion of the [national] emergency"); *see also Mezei v. Shaughnessy*, 195 F.2d 964, 968 (2d Cir. 1952) (summarizing government's argument to court of appeals); *cf. Jay v. Boyd*, 351 U.S. 345, 358-59 (1956) (relying on *Mezei* and *Knauff* primarily as national security cases, rather than exclusion cases, in dismissing challenge to government's use of confidential information in deportation proceeding).[22]

The government would now stretch *Mezei*'s narrow holding to reach the indefinite detention of every inadmissible noncitizen, including those, like petitioner, who have lived here for many years even if they never were formally admitted. It is simply not true, however, that each and every one "creates an obvious gap in border security," or that the

[22] The Solicitor General has not raised any specific national security (or even dangerousness) concerns with respect to the petitioner. Indeed, the government not only determined in September 2003 that petitioner is currently a candidate for release, but it first released petitioner on parole shortly after he arrived in the United States in 1980.

supervised release into the community of such individuals would necessarily expose an "unprotected spot in the Nation's armor." *See* Brief for the Respondent on Petition for Writ of Certiorari at 14-15.

Today, *Zadvydas* embodies the fundamental values consistent with this nation's long tradition of due process and the rule of law—that an individual's indefinite administrative detention does not become lawful because it purportedly occurs pursuant to the government's enforcement of the immigration statutes. *Mezei*, by contrast, was an anomaly when it was decided, and, at least as interpreted as broadly as the government proposes, has been rendered obsolete by this Court's last half-century of due process jurisprudence. At most, *Mezei* should be understood to stand for the proposition that the government may exclude and continue to detain an inadmissible noncitizen in carefully limited circumstances, based on the assertion of a specific national security interest and in accordance with procedures required by the Due Process Clause. *Cf. Zadvydas*, 533 U.S. at 696 ("[We do not] consider terrorism or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security."). This Court should not transform *Mezei*'s dictum, as the government urges, into a sweeping principle of constitutional law that places an individual's potentially lifelong administrative detention beyond all guarantees of due process simply because he has been found "inadmissible" for immigration purposes.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

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IN THE

Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, BUREAU OF IMMIGRATION AND CUSTOM ENFORCEMENT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. SECTION 1231(A)(6) DOES NOT AUTHORIZE INDEFINITE DETENTION OF INADMISSIBLE ALIENS. 4

A. The Government's Interpretation Of § 1231(a)(6) Will Embroil The Court In Continual And Unnecessary Constitutional Adjudication. 5

B. The Plain Language Of § 1231(a)(6) Requires Construing The Statute To Authorize The Same Detention Period For All Aliens Governed By The Section. 9

C. Neither Prior Nor Subsequent Legislative History Justifies Straying From The Plain Statutory Language Of § 1231(a)(6). 12

II. EVEN UNDER THE MOST RESTRICTIVE READING OF THE DUE PROCESS CLAUSE, THE GOVERNMENT'S CONSTRUCTION OF THE STATUTE RAISES SERIOUS CONSTITUTIONAL PROBLEMS WITH RESPECT TO MARIEL CUBANS WHO WERE AFFIRMATIVELY PAROLED INTO THE UNITED STATES AS REFUGEES NEARLY TWENTY-FIVE YEARS AGO. 16

TABLE OF CONTENTS—Continued

Page

A. This Court Has Never Applied The "Entry Fiction" To Deny Due Process Protection To Aliens Who Are Physically Present In The United States Pursuant To A Grant Of Immigration Parole. 18

B. Mariel Cuban Parolees Fall Within A Long Tradition Of The Government Using Its Parole Authority To Bring Refugees Into The United States For Permanent Resettlement. 21

C. Congress And This Court Have Recognized The Lawful Status Of Parolees And Congress Has Bestowed On Refugee-Parolees In Particular Some Of The Same Benefits As Other Lawful Permanent Residents. 24

D. The Government's Purported Justifications For Indefinite Detention Of Inadmissible Aliens Are Especially Unpersuasive When Viewed In The Context Of Mariel Cuban Parolees. 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page(s)

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 9
Alvarez-Mendez v. *Stock*, 941 F.2d 956 (9th Cir. 1991) 13
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 7
Benitez v. *Wallis*, 337 F.3d 1289 (2003) 8, 9, 16, 17
Bowen v. *Yuckert*, 482 U.S. 137 (1987) 15
Brown v. *Gardner*, 513 U.S. 115 (1994) 12
Crowell v. *Benson*, 285 U.S. 22 (1932) 10
Department of Commerce v. *United States House of Representatives*, 525 U.S. 316, 342 (1999) 14
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 16
Federation for American Immigration Reform, Inc. v. *Reno*, 93 F.3d 897 (D.C. Cir. 1996) 26
Garcia-Mir v. *Meese*, 788 F.2d 1446 (11th Cir. 1986) 27
Gisbert v. *United States Attorney General*, 988 F.2d 1437, *amended by* 997 F.2d 1122 (5th Cir. 1993) 13
In re Baro, 6 OCAHO 861, 1996 WL 430388 (May, 16, 1996) 26
In re Collado, 21 I&N 1061 (1998) 7
In re Krajcirovic, 87 F. Supp. 379 (D. Mass. 1949) 13
International Primate Protection League v. *Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991) 10
Jean v. *Nelson*, 472 U.S. 846 (1985) 8
Kaplan v. *Tod*, 267 U.S. 228 (1925) 18, 19, 22
Landon v. *Placensia*, 459 U.S. 21 (1982) 6, 17, 18, 24, 27
Leng May Ma v. *Barber*, 357 U.S. 185 (1958) 18, 19, 22
Lin Guo Xi v. *INS*, 298 F.3d 832 (9th Cir. 2002) 29
Matthews v. *Diaz*, 426 U.S. 67 (1976) 24
Peretz v. *United States*, 501 U.S. 923 (1991) 9
Plyler v. *Doe*, 457 U.S. 202 (1982) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Porto Rico Ry, Light & Power Co v. *Mor*, 40 S. Ct. 516 (1920) 11
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 11, 12
Rogers v. *Quan*, 357 U.S. 193 (1958) 20
Rosales-Garcia v. *Holland*, 322 F.3d 386 (6th Cir.), *cert. denied*, 123 S. Ct. 2607 (2003) 29
Rosenberg v. *Fleuti*, 374 U.S. 449 (1963) 6
Rust v. *Sullivan*, 500 U.S. 173 (1991) 9
San Francisco Arts & Athletics, Inc. v. *United States Olympic Committee*, 483 U.S. 522 (1987) 10
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Page(s)

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8 U.S.C. § 1182(d)(5) 5, 18, 22
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8 U.S.C. § 1231(a) ..... *passim*
8 U.S.C. § 1253 29
8 U.S.C. § 1255(a) 26
42 U.S.C. § 1382c(a)(1)(B) 24

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TABLE OF AUTHORITIES—Continued

Page(s)

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H.R. 1915 (1995) 16
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INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union ("ACLU") is a national, nonprofit, nonpartisan organization of more than 400,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. Through its Immigrants' Rights Project, the ACLU engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants.

STATEMENT OF THE CASE

This case involves the indefinite detention of Daniel Benitez, a Cuban refugee who was paroled into the country as part of the "Mariel" boat-lift in 1980 and has lived here since. Benitez is subject to a final order of exclusion as an inadmissible alien but he cannot be expelled because Cuba will not accept his return. The government claims that 8 U.S.C. § 1231(a)(6) authorizes his indefinite and potentially permanent imprisonment, subject only to an unreviewable administrative determination of whether he should be released. For the reasons that follow § 1231(a)(6) does not provide such authority.

SUMMARY OF ARGUMENT

In *Zadvydas* v. *Davis*, this Court definitively construed 8 U.S.C. § 1231(a)(6) to permit detention only for "a period reasonably necessary to bring about ... removal from the United States." 533 U.S. 678, 689 (2001). The Court adopted that construction in light of the constitutional problems that indefinite detention would have posed for the former lawful permanent residents in that case. The government submits that the Court's statutory construction of § 1231(a)(6) should

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[1] Letters of consent to the filing of this brief are submitted to the Court with this brief. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the amicus itself, made a monetary contribution to the preparation or submission of this brief.

be limited to aliens whose indefinite detention presents the constitutional problems found in *Zadvydas* and that the indefinite detention of Benitez and other inadmissible aliens poses no such problem.

This brief makes two points. First, the government's approach to statutory construction would embroil the courts in repeated, unnecessary, and time-consuming constitutional analysis in a manner that is fundamentally at odds with the principle of constitutional avoidance. Because the class of "inadmissible aliens" includes a myriad of differently situated aliens who present distinct constitutional concerns, courts would be forced to reinterpret the statute in light of the presence or absence of constitutional questions raised by successive litigants. This would result in a proliferation of differing constructions.

Moreover, the text of § 1231(a)(6) does not permit different constructions for removable and inadmissible aliens. Nothing in the language of the statute, this Court's analysis in *Zadvydas*, or the statute's legislative history supports distinguishing between removable and inadmissible aliens with respect to the length of detention authorized by that statute. Congress' recent enactments further confirm that no such distinction is intended.

Second, should the Court nonetheless choose to follow the path advocated by the government, it would still need to find that that § 1231(a)(6) does not authorize indefinite detention of Mariel Cubans like Benitez because of the serious constitutional problems such detention would raise.[2] Amicus

[2] Of particular concern to amicus, although not addressed in this brief, is the lack of procedural protections to ensure that individuals like the petitioner who pose no significant danger and who cannot be removed are not unnecessarily detained. As set forth in the Brief of Amici Curiae American Immigration Law Foundation, et al. in Support of Petitioner, and in the Brief for Amici Curiae Legal and Service Organizations in Support of Petitioner, the current regulatory scheme does not begin to provide such protections. Were such procedures in place, petitioner would undoubtedly been released long ago.

submits that all detained aliens have a constitutionally protected liberty interest that is implicated by indefinite detention. However, this case presents the narrower question of whether the indefinite detention of Mariel Cuban parolees raises serious constitutional concerns sufficient to compel the statutory construction adopted in *Zadvydas*. Even under the most restrictive reading of the Due Process Clause, the particular circumstances of Mariel Cuban parolees distinguish them from other inadmissible aliens and render their indefinite detention constitutionally suspect.

Extending the "entry fiction" to deny due process protections to Mariel Cuban parolees would be a significant and unwarranted expansion of that doctrine. As a threshold matter, this Court has never applied that fiction to deny due process rights to parolees. Moreover, the Mariel Cubans fall within a special class of refugee parolees who were invited to the United States, were inspected and paroled into the country at the time of their arrival and have been afforded virtually all the rights and benefits of refugee status. In addition, Congress has bestowed upon them some of the same benefits as lawful permanent residents.

The government's national security and border control justifications for indefinite detention are particularly unpersuasive when viewed in the context of Mariel Cuban parolees who have been physically present in our country for nearly twenty-five years and who were initially welcomed here as refugees after being duly inspected and screened. In addition, the government has other means to address its concerns about border control and national security, including 8 U.S.C. § 1226a, which specifically authorizes prolonged post-final-order detention of both inadmissible and removal aliens who are certified as a threat to national security.

ARGUMENT

I. SECTION 1231(A)(6) DOES NOT AUTHORIZE INDEFINITE DETENTION OF INADMISSIBLE ALIENS.

In *Zadvydas* v. *Davis*, this Court considered the length of detention authorized under 8 U.S.C. § 1231(a)(6) when an alien cannot be deported. In light of the constitutional problems that indefinite detention would have posed in relation to the former lawful permanent residents in that case, the Court definitively construed the statute to authorize detention for only "a period reasonably necessary to bring about that alien's removal from the United States." 533 U.S. 678, 689 (2001).

The government's central contention is that the Court's statutory construction of § 1231(a)(6) should apply only to aliens whose indefinite detention also presents constitutional problems. Thus, the government argues, because the indefinite detention of inadmissible aliens who were "stopped at the border and denied admission" does not in the government's view present a constitutional problem, § 1231(a)(6) should be construed differently when applied to such aliens. *See* Respondent's Brief in Response to Petition for Certiorari (Respondent's Cert. Brief) at 16-17.

The government's approach to statutory adjudication will lead the courts down a path that is fundamentally at odds with the purpose of constitutional avoidance, as it will require courts to engage in continual constitutional analysis in order to determine the meaning of § 1231(a)(6). This approach, moreover, cannot be reconciled with the Court's definitive construction of the statute in *Zadvydas*; with the statute's plain language, which makes no distinction between different categories of aliens; or with the absence of any other evidence that Congress intended to authorize different periods of post-final-order detention for the various classes of aliens the statute covers.

A. The Government's Interpretation Of § 1231(a)(6) Will Embroil The Court In Continual And Unnecessary Constitutional Adjudication.

The government's argument that the meaning of § 1231(a)(6) should turn on whether a particular application presents constitutional problems will enmesh the courts in continual consideration of unnecessary constitutional questions. Under the government's approach the statute will have no fixed meaning. Instead, each application of § 1231(a)(6) will have to be assessed in light of whether it presents a constitutional problem.

The government asserts that the limitation on detention in § 1231(a)(6) should not apply to inadmissible aliens like Benitez because their detention does not present the constitutional concerns that animated the Court's decision in *Zadvydas*. Respondent's Cert. Brief at 16. That assertion disregards that § 1231(a)(6) applies to *any* inadmissible alien, and that the class of "inadmissible aliens" itself encompasses many categories of aliens who are very differently situated.

For example, the class of "inadmissible aliens" includes individuals "stopped at the border" as well as individuals who are present in the United States but were never formally inspected, 8 U.S.C. § 1182(a)(6)(A)(i) (defining aliens present without inspection as inadmissible); first-time entrants as well as longtime residents returning from a trip abroad;[3] and individuals who have never been physically present in the country except in a detention center as well as those who have lived in this country for extended periods of time.

Moreover, it includes individuals with different kinds of legal status, including lawful permanent residents, 8 U.S.C.

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[3] Noncitizens are generally regarded as seeking "admission" and are therefore subject to inspection and possible exclusion each time they return to the United States from a trip abroad, although returning lawful permanent residents are not regarded as seeking admission into the country under certain circumstances. *See* 8 U.S.C. § 1101(a)(13).

§ 1101(a)(13) (defining circumstances under which lawful permanent resident returning to the United States is deemed to be "seeking an admission"); individuals like Benitez who, although apprehended at the border, are then affirmatively paroled into the United States for humanitarian reasons under 8 U.S.C. § 1182(d)(5); individuals screened and approved for refugee status abroad and then admitted into the United States as refugees under 8 U.S.C. § 1157; and individuals with valid nonimmigrant visas who are found inadmissible on other grounds.

In addition, § 1231(a)(6) applies to any inadmissible alien, regardless of the reason for inadmissibility. While Benitez is inadmissible for a criminal conviction, the statute covers a myriad of other grounds including inadmissibility for "health-related grounds," 8 U.S.C. § 1182(a)(1); for being deemed as "likely at any time to become a public charge," 8 U.S.C. 1182(a)(4); for having entered the United States illegally, 8 U.S.C. § 1182(a)(6); or for not being in possession of valid documents. 8 U.S.C. § 1182(a)(7). *See generally* 8 U.S.C. § 1182(a) (setting forth more than thirty potential grounds of inadmissibility); *Zadvydas*, 533 U.S. at 691 (noting that the statute "does not apply narrowly to 'a small segment of particularly dangerous individuals' ... but broadly to aliens ordered removed for many and various reasons, including tourist visa violations." (citation omitted)).

The government's assertion also disregards that the indefinite detention of each of these categories of aliens may well pose distinct constitutional problems. For example, this Court has previously recognized that two categories of inadmissible aliens—returning lawful permanent residents and individuals present in the country after entering without inspection—are indisputably entitled to due process protection. *See Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) (returning lawful permanent resident in exclusion proceeding retains due process rights notwithstanding status as alien seeking admission); *Zadvydas*, 533 U.S. at 693 ("[a]liens who have once passed through our gates, even illegally, may be

expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." (citation omitted)).[4] Thus, indefinite detention of inadmissible aliens within these two broad categories would plainly present a serious constitutional problem similar, if not identical, to the one that led this Court in *Zadvydas* to adopt a saving construction of the statute.

Presumably for this reason, the government has already concluded that *Zadvydas* covers one of these categories of inadmissible aliens—individuals present without inspection. *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,969 (Nov. 14, 2001) (codified at 8 C.F.R. § 241.13) (explaining this exception on the grounds that *Zadvydas* distinguished aliens "who have entered the United States" from those inadmissible aliens "who are presumed ... to be at the border").[5]

The government's recognition that § 1231(a)(6) authorizes only limited detention of some "inadmissible aliens" shows that a simple distinction between inadmissible and other aliens is not sufficient to distinguish between those categories of aliens who can constitutionally be subject to indefinite detention and those whose detention presents constitutional problems. Thus, even were the Court to agree

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[4] Under the 1996 revisions to the immigration law, all aliens not formally "admitted" are now included in the inadmissible category, *see* 8 § U.S.C. § 1182(a)(6)(A)(i), whereas previously, these aliens were considered "deportable." In addition, lawful permanent residents returning to the United States are now deemed to be seeking admission even if their trip outside the country would not have constituted an entry under prior law because the departure was "innocent, casual, and brief," *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462 (1963). *See* 8 U.S.C. § 1101(a)(13); *In re Collado*, 21 I&N Dec. 1061, 1064-1065 (BIA 1998); *see also Velasquez* v. *Reno*, 37 F. Supp. 2d 663, 665 n.2 (D.N.J. 1999) (noting treatment of longtime lawful permanent resident as inadmissible owing to brief trip outside country and minor conviction from 19 years earlier).

[5] It remains unclear what position government takes with respect to returning lawful permanent residents, a group that has become significantly larger in light of changes enacted in 1996. *See* note 4, *supra*.

with the government that no constitutional problem is presented in the instant case—a position with which amicus strongly disagrees (*see* point II, *infra*)—lower courts would be forced to revisit the issue repeatedly as cases are brought on behalf of inadmissible aliens who are differently situated.

An elementary principle of adjudication is that the courts are to avoid considering constitutional questions if possible. *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring) (enumerating strategies "the Court developed for its own governance" to avoid considering constitutional questions). Thus, the goal of avoiding constitutional adjudication is ill served if every subsequent application of a previously construed statute turns on the presence or absence of a constitutional problem.

The government's approach is thus the antithesis of constitutional avoidance. If that approach is adopted, instead of a single statute consistently applied, the result will be a plethora of rulings based on assessments of which detainees' indefinite detention presents a sufficiently serious constitutional problem to warrant a saving construction of § 1231(a)(6). The government's approach, therefore, would exacerbate the need for constitutional analysis rather than diminish it.

This case illustrates that problem. Because the Eleventh Circuit misread *Zadvydas* to limit the detention period authorized by § 1231(a)(6) of only those cases presenting a constitutional problem, it felt obliged to determine "whether inadmissible aliens have a constitutional right to be free from indefinite detention." *Benitez v. Wallis*, 337 F.3d 1289, 1296 (11th Cir. 2003). Only after concluding that "inadmissible aliens, like Benitez, have no constitutional rights precluding indefinite detention," *id.*, at 1296, 1298, did the court decide whether § 1231(a)(6) actually imposed a limit on detention.[6] That sequence, which is the necessary result of the

[6] Had the Eleventh Circuit correctly followed the avoidance canon, "it would have addressed the issue involving the immigration statutes and

government's proposed approach, turns constitutional avoidance on its head.

B. The Plain Language Of § 1231(a)(6) Requires Construing The Statute To Authorize The Same Detention Period For All Aliens Governed By The Section.

Wholly apart from whether the doctrine of constitutional avoidance counsels against construing the statute differently for different categories of aliens, the plain language of § 1231(a)(6) does not permit that result. In *Zadvydas*, the Court did not construe the statute by limiting the classes of aliens to whom it applied or by carving out from the statute those aliens whose indefinite detention posed a potential constitutional problem.[7] Rather, the Court held that § 1231(a)(6) authorizes detention of all aliens subject to it only so long as removal is reasonably foreseeable.[8]

INS regulations first, instead of after its discussion of the Constitution." *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985).

[7] Nor could the Court have done so given the absence of any textual basis for such a distinction. The doctrine of constitutional avoidance does not provide courts with "*carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do," *United States* v. *Locke*, 471 U.S. 84, 95 (1985); *see also Peretz* v. *United States*, 501 U.S. 923, 932 (1991) (constitutional avoidance is inappropriate where statutory text is clear); *Rust* v. *Sullivan*, 500 U.S. 173, 182 (1991) (same); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting) (same). Even to avoid grave constitutional concerns, courts are simply not free to amend statutes: Where an exception is not "expressed in the statute," then "to engraft it would be an act of pure judicial legislation." *United States ex rel. Attorney Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 405 (1909).

[8] The Eleventh Circuit's opinion below thus reads as an as-applied constitutional ruling of *Zadvydas* that narrowly creates an exemption for aliens whose detention would raise constitutional doubts. *See Benitez* v. *Wallis*, 337 F.3d at 1299 ("Because *Zadvydas* was qualified in so many respects and reads like an as-applied decision, we conclude that the Supreme Court left the law, and it seems to us the statutory scheme too, intact with respect to inadmissible aliens who never have been admitted into the United States.").

The language of § 1231(a)(6) does not provide any textual basis for exempting any category of aliens covered by the section.[9] The words of the statute and the definitions of the immigration act leave no doubt that the provision applies to all aliens. Thus, the question this Court faced in *Zadvydas* was not *whom* the Government may detain under § 1231(a)(6), indefinitely or otherwise, but rather, for *how long* § 1231(a)(6) grants authority to detain at all.[10]

The Court resolved that question by reading the provision in § 1231(a)(6) permitting detention "beyond the removal period" to authorize detention only for "a period reasonably necessary to bring about ... removal from the United States." *Zadvydas*, 533 U.S. at 689.[11] Since that single statutory clause is the basis for detention under the statute, it is not "fairly possible"[12] to read § 1231(a)(6) as authorizing different detention periods for the two classes of aliens who are subject to that clause, namely those who are either inadmissible or "removable."[13] There is no basis for construing the phrase "beyond the removal period" differently depending on the category of aliens to whom it is being applied.

[9] Section 1231(a)(6), entitled "Inadmissible or criminal aliens," provides in relevant part:

> An alien ordered removed who is inadmissible under section 1182, removable under section 1227(a)(1)(c), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period.

[10] *See Zadvydas*, 533 U.S. at 682 ("In these cases, we must decide whether this post-removal-period statute authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal.").

[11] In common usage the preposition "beyond" typically means "in addition to" or "farther" than; it does not ordinarily mean "forever." *See* Webster's Third New Int'l Dictionary of the English Language Unabridged 210 (2002).

[12] *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

[13] *See International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 80 (1991) ("statute's meaning is 'mandated' by its 'grammatical structure'" (quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989))); *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 528-529 (1987).

As this Court has noted, ascribing "various meanings to a single iteration" applicable to numerous statutory sections would open a "Pandora's jar" of malleability. *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994) (citation omitted).[14] In the present case, that admonition applies even more acutely because the government would have the Court ascribe different meanings to the same phrase "beyond the removal period" depending on which term it modifies in the very same sentence of § 1231(a)(6).

Yet the government's attempt to apply its interpretive principle compels it not only to urge such a construction, but additionally to suggest that the statute should be read differently within the category of inadmissible aliens. As noted above, it has decided that *Zadvydas'* construction of § 1231(a)(6) should apply to one category of inadmissible aliens—those who are present in the United States after entering without inspection, *see* 66 Fed. Reg. 56,967, 56,969 (Nov. 14, 2001)— but not to others like Benitez. The absence of any linguistic support for reading the plain language of § 1231(a)(6) differently for inadmissible and admitted aliens is even more pronounced when the statute is read as applying differently to individuals falling within the single category of inadmissible aliens.[15]

As Justice Kennedy pointed out in *Zadvydas*, "it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of

[14] In *Ratzlaf*, this Court held that the adverb "willfully" had to be interpreted to mean the same thing with respect to all of the terms it modified. *Id.*

[15] *See, e.g., Porto Rico Ry., Light & Power Co* v. *Mor*, 40 S. Ct. 516 (1920) ("When several words in a statute are followed by a clause which is as much applicable to the first and other words as to the last, the natural construction of the language demands that it be read as applicable to all.").

this possibility." 533 U.S. at 710 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and in relevant part by Scalia, J., and Thomas, J.). The government has in fact previously argued the same point:

> [The Supreme] Court has long recognized that, when Congress uses the same language even in different parts of the same statute, it generally intends the language to have the same meaning. That rule is "at its most vigorous when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). A fortiori here, where Congress enacted a single grant of authority to the Attorney General over several categories of aliens, Congress must be understood to have intended the same language to confer the same authority with respect to each category.[16]

The Government has now abandoned that position to attempt to avoid the unmistakable consequence that § 1231(a)(6) authorizes the same period of detention for all categories of aliens subject to it.

C. Neither Prior Nor Subsequent Legislative History Justifies Straying From The Plain Statutory Language Of § 1231(a)(6).

The legislative history of § 1231(a)(6) and subsequent enactments further confirm that Congress did not intend the statute to distinguish between inadmissible and removable aliens.[17]

Section 1231(a)(6) was enacted by Congress in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 305, 110 Stat. 3009-546 (IIRIRA). In *Zadvydas*, the Court reviewed the statutory history preceding § 1231(a)(6)'s enactment and concluded that there was "nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention." 533 U.S. at 699. That conclusion is definitive in this case as well; if there is no evidence of congressional intent to authorize indefinite detention at all under § 1231(a)(6), then the legislative history plainly cannot exhibit intent to authorize indefinite detention of some aliens but not others.[18]

The legislative history of § 1231(a)(6) offers no support for differential application of the statute's grant of power to detain. The phrase allowing the Government to detain certain aliens "beyond the removal period" first appeared in the Immigration in the National Interest Act of 1995, which be-

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[16] Brief for the Petitioners in *Reno* v. *Ma* at 47, No. 00-38 (filed Nov. 24, 2000), *available at* 2000 WL 1784982.

[17] When the text of a statute is clear, as it is here, a court should not turn to extrinsic evidence of legislative intent. *See, e.g., Ratzlaf*, 510 U.S. 135, 147-148 ("we do not resort to legislative history to cloud a statutory text that is clear."). Nonetheless, even if legislative history were considered, the result will be the same.

[18] In other cases, the government has argued that pre-1996 statutes authorized indefinite detention of "excludable" aliens and that it would be anomalous to read the 1996 laws as imposing limits on the government's detention power. First and importantly, the current statute applies to a far broader class of aliens than the pre-1996 "exclusion" provisions, so it would not be anomalous at all for Congress to have enacted a less sweeping detention authority. Section 1231(a)(6) is broader than pre-1996 law because it applies to inadmissible aliens, a category that includes not only individuals who were formerly deemed "excludable," but also many who were previously considered "deportable." *See* note 4, *supra*. Second, whether the pre-1996 laws authorized indefinite detention of excludable aliens was an issue never considered by this Court. Although a number of circuit courts found *implicit* authority for indefinite detention in these statutes, *see, e.g., Gisbert* v. *United States Attorney General*, 988 F.2d 1437, *amended by* 997 F.2d 1122 (5th Cir. 1993); *Alvarez-Mendez* v. *Stock*, 941 F.2d 956 (9th Cir. 1991) the language of these statutes is even *less* express than 1231(a)(6), and in light of *Zadvydas* cannot be understood to have authorized such detention. Limited detention of excludable aliens is, moreover, far more consistent with historical practice than indefinite detention for an unlimited period. *See* Brief of Amicus Curiae American Bar Association ("ABA Brief") (citing *Staniszewski* v. *Watkins*, 80 F. Supp. 132 (S.D.N.Y. 1948), *In re Krajcirovic*, 87 F. Supp. 379 (D. Mass. 1949), and other cases which limited post-final-order detention of excludable aliens to several months).

gan as H.R. 1915, sponsored by Representative Lamar Smith, and was later reintroduced as H.R. 2202. The original Section 305 of H.R. 2202, entitled "Detention And Removal Of Aliens Ordered Removed (New Section 241)," pertained only to inadmissible aliens.[19] Only when the Senate and House took up consideration of the bill in conference was Section 305's authorization to detain beyond the removal period made applicable to "removable" aliens.[20]

Moreover, there is no evidence that Section 305 was ever intended to authorize indefinite detention when the prospect of actual removal has become remote or nonexistent. Rather, as reflected in the Report of the Committee on the Judiciary House of Representatives on H.R. 2202, the object of Section 305 was to detain inadmissible aliens to secure removal:

> Section 305 seeks to ensure that aliens with a final order of removal under the streamlined procedures established in section 304 are removed from the U.S. within a target period of 90 days from the entry of such order and, during that time, are either detained or released on conditions that ensure they will appear for removal.
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> * * *
>
> The objective of section 305 is that the entry of an order of removal be accompanied by specific requirements to *ensure that the alien will depart* the U.S. No set of reforms in this legislation is more important to establishing credibility in enforcement against illegal immigration.[21]

This is entirely consistent with *Zadvydas'* conclusion that the purpose of detention under § 1231(a) is to effectuate removal, a purpose that is no longer served when removal is not "reasonably foreseeable." 533 U.S. at 699-700.

Subsequent legislative enactments further support both *Zadvydas'* construction of § 1231(a)(6) and its application to inadmissible aliens.[22] As part of the USA Patriot Act, Congress enacted a new provision, 8 U.S.C. § 1226a, entitled "Detention of Terrorist Aliens,"[23] which gives the Attorney General specific authority to certify and detain aliens who pose a terrorist or security threat to the United States.[24] Section 1226a mandates that aliens who are certified under the section shall be taken into custody, and maintained in custody until removed. *See* 8 U.S.C. § 1226a(a)(1)(2).

Section 1226a(a)(6)'s "limit on indefinite detention," however, requires that an alien detained under the section "who has not been removed under § 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6). In addition, § 1226a(b)

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[19] The provision, which eventually became § 1231(a)(6), stated: "Inadmissible Aliens.—An Alien Ordered Removed Who Is Inadmissible Under Section 212 May Be Detained Beyond The Removal Period And, If Released, Shall Be Subject To The Terms Of Supervision In Paragraph (3)." H.R. 2202, 104th Cong. § 305 (1995).

[20] *See* H.R. Rep. No. 104-828, at 215-216 (1996) (stating that "Senate recedes to House section 305, with modifications."). Amicus found nothing in the legislative history that suggests Congress intended the authorization to apply differently to the newly added category of aliens than to the aliens who were the subject of the original bill. *Cf. Dep't of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 342 (1999) (opinion of O'Connor, J.).

[21] H.R. Rep. No. 104-469, pt. 1, at160-161 (1996) (emphasis added).

[22] Courts should interpret provision consistent with subsequent statutory amendments. *See, e.g., Bowen* v. *Yuckert*, 482 U.S. 137, 149-151 (1987).

[23] USA Patriot Act of 2001, Pub. L. No. 107-56, § 402, 115 Stat. 272.

[24] INA sections 212(a)(3)(A)(i) and 212(a)(3)(A)(iii) define as inadmissible aliens who pose security risks such as sabotage or overthrow of the government. Section 212(a)(3)(B) makes aliens inadmissible for past or suspected future terrorist activities. Sections 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), and 237(a)(4)(B) render admitted aliens deportable for the equivalent reasons.

explicitly makes certification and detention determinations reviewable in habeas corpus. 8 U.S.C. § 1226a(b).

Notably, § 1226a draws no distinction between detention of inadmissible and removable aliens. Thus, the provision both authorizes and limits detention of both groups. It is implausible that Congress would have imposed greater restrictions on the government's power to detain suspected terrorists than on its power to detain inadmissible aliens generally. *See, e.g., United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543-544 (1940) (statutory construction should avoid absurd or unreasonable results). Rather, the limitation on detention reflects a congressional understanding that restrictions on indefinite detention are already applicable to all inadmissible aliens. *Cf. FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000) (holding that Congress' specific legislation "effectively ratified" regulatory agency's interpretation of prior law).

The USA Patriot Act also shows that Congress has "affirmatively acted to address the issue," *id.*, of terrorism and other substantial threats to national security, whether posed by admitted or inadmissible aliens, while at the same time making clear that only in those extreme circumstances does Congress intend to authorize ongoing detention of an alien whose removal cannot be effectuated—and even then only for judicially reviewable periods of six months.

II. Even Under The Most Restrictive Reading Of The Due Process Clause, The Government's Construction Of The Statute Raises Serious Constitutional Problems With Respect To Mariel Cubans Who Were Affirmatively Paroled Into The United States As Refugees Nearly Twenty-Five Years Ago.

The government's argument that the indefinite detention of inadmissible aliens poses no constitutional problem rests on the fiction that inadmissible aliens are still at the border seeking admission, even though they are physically present in the United States. *See* Respondent's Cert. Brief

at 16; *see also Benitez*, 337 F.3d at 1296 n.7 (11th Cir. 2003). Moreover, it rests on the premise that aliens at the border have no due process rights with respect to their admission, and by extension, no due process rights with respect to their indefinite detention when admission is denied and they cannot be removed. *See Benitez*, 337 F.3d at 1297-1298. Amicus strongly disagrees with the premise that aliens seeking admission at the border are outside the protection of the Due Process Clause, particularly with respect to their indefinite, potentially permanent detention.[25] However, even if prior decisions of this Court were open to such an interpretation, application of this fiction to a Mariel Cuban[26] who was paroled into this country as a refugee almost twenty-five years

[25] Like the deportable aliens in *Zadvydas*, inadmissible aliens possess a liberty interest in being free from life imprisonment that is distinct from any right to admission. *Cf. Zadvydas*, 533 U.S. at 696 (holding that a deportable alien has a liberty interest in release from "indefinite and potentially permanent" detention that is not tantamount to a right to reside in the United States). With the possible exception of *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), this Court's prior decisions are not to the contrary. *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) recognized that "[t]his Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights *regarding his application*, for the power to admit or exclude aliens is a sovereign prerogative." (Emphasis added) (citations omitted). That inadmissible aliens have no right to *admission* does not mean they have no liberty interest that is implicated by potential life imprisonment. To the extent that *Mezei* can be interpreted to hold otherwise, it is an anomaly that cannot be reconciled with this court's prior or subsequent jurisprudence and is further called into question by *Zadvydas*. *See generally* ABA Brief; Brief of Amici Curiae Professors of Law ("Law Professors' Brief").

[26] Of the 125,000 Mariel Cubans who came to the United States in 1980, only approximately 2,000 were detained on arrival on grounds of criminal records or mental infirmity. The rest were paroled into the country after being screened and processed by INS officials. *See* Brief for Petitioner; Brief of Amicus Curiae Florida Immigrant Advocacy Center ("FIAC Brief"). Benitez is among the latter group of Mariel Cubans who were paroled into the United States rather than being detained for immediate exclusion ("Mariel Cuban parolees"). *See* Brief for Petitioner.

ago would constitute a wholly unwarranted and unprecedented expansion of that fiction.

A. This Court Has Never Applied The "Entry Fiction" To Deny Due Process Protection To Aliens Who Are Physically Present In The United States Pursuant To A Grant Of Immigration Parole.

Amicus does not dispute that Benitez and other Mariel Cuban parolees are subject to the "entry fiction" for statutory purposes. Thus, they remain aliens "seeking admission" to the United States notwithstanding their parole into this country nearly twenty-five years ago and their continued residence here ever since. *See, e.g., Kaplan* v. *Tod*, 267 U.S. 228 (1925) (excludable alien paroled into country held not to have made an "entry" under the immigration statute); *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958) (excludable alien paroled into the country held not to be "within the United States" for purpose of qualifying for withholding of removal under the statute) (both cited by this Court in *Zadvydas* to support the "distinction between an alien who has effected an entry into the United States and one who has never entered," 533 U.S. at 693); *see also* 8 U.S.C. § 1182(d)(5)(A) (grant of parole does not constitute admission under the immigration statute).

The fact that aliens who are paroled into the United States remain inadmissible under the immigration statute does not, however, resolve the question of their constitutional right to due process. For example, in *Landon* v. *Plasencia*, this Court held that a returning lawful permanent resident who was excludable under prior law, and would be inadmissible under present law, retained her due process rights even though she was properly placed in exclusion proceedings. 459 U.S. at 32. Although that case involved a lawful permanent resident rather than a parolee, it stands for the proposition that statutory classification as an inadmissible alien is not determinative of constitutional rights. Thus, even when the "entry fiction" operates to determine statutory rights, it does not and cannot resolve the constitutional question. Indeed, no support can be found in

this Court's jurisprudence for applying the "entry fiction" to parolees in a *constitutional* sense, *i.e.*, to deprive them of their right to due process.

The entry fiction originated in the late nineteenth century as a practical means to address the growing inconvenience of inspecting increasing numbers of immigrants aboard ships. Its early form was manifested in statutes that permitted the "temporary removal" of immigrants from aboard ships for inspection but specified that this did not constitute a "landing," which would have qualified the immigrants for additional statutory rights.[27]

Subsequently, this Court extended the fiction to apply to aliens who were released from immigration detention on "parole," either pending or following exclusion proceedings. Thus, in *Kaplan*, the Court considered the case of an alien who was detained at a port of entry and ordered excluded, but later paroled out of detention because her exclusion order could not be effectuated. The Court held that her parole into the country pending exclusion did not constitute "dwelling in the United States" within the meaning of a naturalization statute so as to entitle her to benefits under that law. *Kaplan*, 267 U.S. at 230. Nor did it constitute an "entry" for purposes of affording her relief from removal pursuant to the statute of limitations on deportation. *Id.* at 231. Absent from this Court's decision was any discussion suggesting that parole affected the petitioner's entitlement to due process.

Similarly, in *Leng May Ma*, the Court considered whether an alien paroled out of detention pending a determination on her admissibility was "within the United States" pursuant to a statute that authorized the Attorney General to withhold deportation if she were so found. *Leng May Ma*,

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[27] For example, a "landing" under an 1891 statute was relevant for determining liability for returning passengers who had been denied entry. *See* Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084; *see also* ABA Brief; Law Professors' Brief.

357 U.S. at 186. Noting that "parole" was "simply a device" for avoiding "needless confinement" pending "administrative proceedings," *id.* at 190, the Court concluded, as a matter "wholly ... of statutory construction," *id.* at 187, that the alien was not "within the United States" to avail herself of withholding. *Id.* at 186. Notably, neither this decision nor any of the Court's other decisions pertaining to immigration parolees[28] have suggested that by virtue of their status as immigration "parolees," petitioners were entitled to lesser constitutional protection. *See Plyler* v. *Doe*, 457 U.S. 202, 212 n.12 (1982) ("In [*Leng May Ma*] the Court held, *as a matter of statutory construction*, that an alien paroled into the United States pursuant to § 212(d)(5) was not 'within the United States' for the purpose of availing herself of § 243(h) ...." (emphasis added)).

Although in two cases the Court invested the entry doctrine with constitutional dimensions, it has never done so in a case involving immigration parolees who were actually released into the country pursuant to parole. In both *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), and *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), this Court relied on the entry fiction to reject due process claims by inadmissible alien petitioners who were detained at Ellis Island. In *Mezei*, the Court explained that "temporary removal from ship to shore" was not considered a "landing," but "an act of legislative grace," which "bestow[ed] no additional rights." 345 U.S. at 215. Even assuming those decisions are good law, *but see* Law Professors' and ABA Briefs, they do not resolve the rights of immigration parolees like the Mariel Cubans who were released into the country pursuant to parole instead of remaining in immigration detention. This Court has never extended the holdings of those cases to embrace aliens released into this country on immigration parole.

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[28] *See, e.g., Rogers* v. *Quan*, 357 U.S. 193 (1958) (holding, in a companion case to *Leng May Ma*, that the same withholding statute was unavailable to aliens paroled pending exclusion proceedings).

B. Mariel Cuban Parolees Fall Within A Long Tradition Of The Government Using Its Parole Authority To Bring Refugees Into The United States For Permanent Resettlement.

None of this Court's cases limiting the rights of parolees in immigration proceedings involve refugee-parolees like the Mariel Cubans, who were initially invited into the country by our government[29] and later granted parole into the country with the express intent that it would lead to resettlement and lawful permanent residence. *See* Robert Pear, *Carter and Congress to Discuss Status of Refugees*, N.Y. Times, June 4, 1980, at A18 ("Two assumptions shared by most officials supervising refugee resettlement are that virtually all the Cubans will stay in the United States and that the Federal Government will eventually subsidize generous benefits for them."); *see also* FIAC Brief.

In the immigration context, "parole" has been used in two principal ways—as a means for securing temporary release from immigration detention for inadmissible aliens pending exclusion proceedings, and as a method for affirmatively bringing individuals or groups of individuals into the country, usually for humanitarian reasons, as a first step towards granting them permanent resident status.[30]

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[29] On May 5, 1980, in a highly publicized speech, President Carter declared, "[w]e'll continue to provide an open heart and open arms to refugees seeking freedom from communist domination and from the economic deprivation brought about primarily by Fidel Castro and his government." Steven R. Weisman, *President Says U.S. Offers "Open Arms" to Cuban Refugees*, N.Y. Times, May 6, 1980, at A13 ("Open Arms Speech"). Thereafter, the Mariel Cubans were granted temporary but renewable parole until permanent legislation could be enacted to enable them to become permanent residents. *See* FIAC Brief.

[30] *See* Marvin Samuel Gross, Comment, *Refugee-Parolee: The Dilemma of the Indochina Refugee*, 13 San Diego L. Rev. 175, 177, 180 (1975). In addition, parole has also been used in a number of other ways, including to permit excluded aliens to enter the United States to testify as a witness or defendant in a criminal case. *See id.* at 177.

At the time that the Court decided *Kaplan* and *Leng May Ma*, parole was being used primarily in lieu of detention pending exclusion proceedings. *See, e.g., Kaplan*, 267 U.S. at 230 (referring to immigrant parolee as one whose "prison bounds were enlarged"); *see also* Gross, *supra*, at 177. However, during the mid-1950s and increasingly thereafter, the President and Congress began to use the parole power as a means of bringing large groups of refugees into the country.[31] The Mariel Cuban parolees fall squarely within this tradition. *See generally* FIAC Brief, detailing history of the Mariel boatlift and similarities between government's treatment of the Mariel Cubans and its treatment of prior groups of refugees.

Thus, although the Mariel Cuban parolees were not admitted to the United States as statutory "refugees" under the newly enacted 8 U.S.C. § 1157,[32] they were treated in all significant respects as refugees. For example, rather than being detained for the purpose of exclusion proceedings, as

[31] *See* Arthur C. Helton, *Immigration Parole Power: Toward Flexible Responses to Migration Emergencies*, 71 No. 47 Interpreter Releases 1637, 1638 (Dec. 12, 1994). The parole authority was not codified until 1952. *See* 8 U.S.C. § 1182(d)(5). Prior to that time no authority existed for using the parole power to bring in large groups of refugees. Gross, *supra*, at 178. Although the parole statute was used to admit 923 orphans in 1952, its first significant use to admit refugees was announced in 1956 by President Eisenhower for the purpose of bringing in 32,000 refugees from the Hungarian Revolution, while about 6000 Hungarians were granted visas that remained available under the Refugee Relief Act. Congress later enacted the Act of July 25, 1958 to enable these refugees to adjust to permanent resident status. *See* FIAC Brief.

[32] Section 1157 was enacted as part of the Refugee Act of 1980, which was signed into law on March 17, 1980, barely a month before the Mariel boatlift began. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102. "[P]roponents of the Refugee Act . . . argued that [it] could have been applied to the 1980 Cuban influx [b]ut the need for speed and flexibility in this migration emergency became paramount." Helton, *supra*, at 1641; *see also* FIAC Brief (explaining that Carter chose not to admit the Mariel Cubans as refugees under this provision in part because doing so would have taken up a large percentage of the refugee quota allowance for that year).

is typically the practice for inadmissible aliens who arrive at our borders without authorization, Mariel Cubans like Benitez were immediately processed for resettlement and other government benefits. The Refugee Education Assistance Act created a special classification for the Mariel Cubans[33] that later allowed them to become automatically eligible, like refugees, for permanent residence.[34] The government referred to Benitez himself as a "Cuban refugee" in denying his application for adjustment of status. J.A. 50-51. Finally, in seeking special legislation to ease their integration into society and provide for their adjustment to permanent residence, both the President and Congress consistently referred to the Mariel Cubans as "refugees."[35] *See generally* FIAC Brief.

[33] Pub. L. No. 96-422, § 501(e), 94 Stat. 1799, 1810 (1980) (codified at 8 U.S.C. § 1522). The legislation established a new classification, "Cuban-Haitian entrant (status pending)," which was intended to provide an interim solution for Mariel Cubans until legislation could be enacted to allow them to adjust status to permanent residence like other refugees. *See* FIAC Brief.

[34] In 1984, the Reagan Administration announced a policy under which Mariel Cubans and other Cubans within the classification "Cuban-Haitian entrant," were permitted to adjust to permanent resident status pursuant to the Cuban Adjustment Act of 1966. *See* Registration of Mariel Cubans, 49 Fed. Reg. 46,212 (Nov. 23, 1984). Two years later, Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"), which also provided a mechanism for Mariel Cubans to adjust their status to permanent residents. Pub. L. No. 99-603, § 202, 100 Stat. 3359, 3404-3405 (codified as amended at 8 U.S.C. § 1255a (1988)).

[35] *See, e.g.*, Open Arms Speech, *supra* ("[w]e'll continue to provide an open heart and open arms to refugees . . . ."); 126 Cong. Rec. 12,529 (1980) (statement of Sen. Heinz) (urging the resettlement of "Cuban refugees," "America's newest immigrants," who "intend[ed] to be and w[ould] be very productive, hard-working members of our society"); 126 Cong. Rec. 12,770 (1980) (statement of Sen. Baker) (noting that the country's absorption with "humanitarian concern and the awesome task of feeding, clothing, and assimilating this latest groups of immigrants" was "how it should be" and that "[w]e must make every effort to provide refuge for those fleeing Cuba"); 126 Cong. Rec. 9621 (statement of Sen. Kennedy) (1980) ("An administration that professes to care about human rights, and which condemns the Cuban government for not permitting refugees to leave,

C. Congress And This Court Have Recognized The Lawful Status Of Parolees And Congress Has Bestowed On Refugee-Parolees In Particular Some Of The Same Benefits As Other Lawful Permanent Residents.

In *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982), this Court reiterated that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." Although parolees have technically never gained "admission" to this country—at least not in a statutory sense—both Congress and this Court have recognized that they are lawfully present in the United States. For example, in *Matthews* v. *Diaz*, 426 U.S. 67, 69 (1976), this Court described the Cuban parolee plaintiffs in that case as having been "lawfully admitted to the United States." And in 8 U.S.C. § 1182 (a)(9)(B)(ii), Congress made clear that time spent in the country under a grant of parole does not constitute "unlawful presence" under the immigration statute so as to trigger future bars to admission.

In recognition of their lawful status, Congress has also made parolees eligible for some of the same benefits that are available to lawfully admitted residents. *See, e.g.*, 42 U.S.C. § 1382c(a)(1)(B) (specifically including immigrant parolees within the category of noncitizens "permanently residing in the United States under color of law" and thereby rendering them eligible, along with citizens and lawful permanent residents, for supplemental social security benefits). In further recognition that parolees are in many ways more like permanent residents, Congress counts certain parolees who remain in the United States more than one year against the total number of family-sponsored immigrant visas permissible in a fiscal year. 8 U.S.C. § 1151(c)(4).

cannot close our country's doors to the Cuban 'boat people.' We must respond in a humane and effective way to this exodus of refugees."); H.R. Rep. No. 99-682(I), at 76 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5680 (noting that ("[a]ll major church, civil rights, legal, trade union, human rights and voluntary service organizations familiar with the plight of [Mariel Cuban] refugees have unambiguously and repeatedly endorsed [Congressional] proposals" for the adjustment of their status to permanent residency).

Congress has bestowed additional privileges on refugee-parolees, treating them almost identically to refugees admitted under 8 U.S.C. § 1157. In addition to providing them with a range of benefits,[36] Congress has entitled refugee-parolees to adjustment of status provisions more generous than those available to other immigrants. For example, Mariel Cuban parolees, like refugees admitted under § 1157, are automatically eligible to adjust to permanent resident status after only one year in the country and without needing to satisfy any other requirements for an immigrant visa.[37] Moreover, they are specifically exempt from certain grounds of inadmissibility that would otherwise apply.[38] Furthermore, when they do obtain permanent residency, their date of "lawful admission" for permanent residence is deemed to be thirty months prior to the filing of their applications for adjustment of status, *i.e.*, during the time that

[36] *See, e.g.*, Refugee Education Assistance Act of 1980, *supra*; Pres. Determ. No. 80-24, 45 Fed. Reg. 62,007 (Aug. 7, 1980) (appropriating up to $20 million in light of "urgent refugee and migration needs" of Cubans arriving in the United States); Pres. Determ. No. 80-27, 45 Fed. Reg. 65,993 (Sept. 21, 1980) (appropriating, in light of "urgent refugee and migration needs" a further $31 million "for the purposes of processing, transporting, caring, and resettling ... Cubans"); *Text of State Dep't Statement on a Refugee Policy*, N.Y. Times, June 21, 1980, at 8 (noting that Cubans in parole status prior to June 19, 1980 were eligible for Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), and Medicaid under the usual matching formula).

[37] *See* Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (1994 & Supp. II 1996)).

[38] *See* INS Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,691 (May 26, 1999) (stating that aliens eligible for benefits under the Cuban Adjustment Act and Cuban-Haitian entrants are exempt from public charge determinations in adjusting to permanent resident status).

they were parolees.[39] In contrast, most other applicants for permanent residence must have an approved visa petition, must satisfy all of the grounds of inadmissibility, and when granted permanent residence such status becomes effective as of the date of the order approving the adjustment of status.[40] Finally, Mariel Cuban parolees, like § 1157 refugees, are among a select group of immigrants (among these lawful permanent residents) who are entitled to work authorization "incident to their status."[41] In contrast, most other immigrants must either apply for permission to work or are authorized to work only for a designated employer.

Indeed, Congress has recognized the *de facto* permanent resident status of Mariel Cuban parolees. Thus, in providing for the adjustment of status of Mariel Cuban parolees, who had not yet adjusted to permanent resident status under the Cuban Adjustment Act of 1966, the House Judiciary Committee Report on IRCA noted that "both the House and the Senate" had previously recognized "the inappropriateness of continuing parole for a group of people who are permanently residing in the United States under color of law"

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[39] *See* 8 U.S.C. § 1159(a)(2); Cuban Adjustment Act of 1966, *supra*. For Mariel Cubans who adjusted under the 1986 Cuban Haitian Adjustment Act, lawful permanent residence related back to January 1, 1982. In the case of § 1157 refugees, lawful permanent resident status relates back to their date of arrival in the United States. 8 U.S.C. § 1159(a)(2).

[40] *See* 8 U.S.C. § 1255(a); 8 C.F.R. § 245.2(a)(5)(ii).

[41] *See* 8 C.F.R. § 274a.12(a)(3), (4) (including both § 1157 refugees and "refugee-parolees" under the classes of immigrants authorized to work "incident to status"); *see also* INS Telegraphic Message CO 242.1-P (July 3, 1980), *reprinted in* 57 Interpreter Releases 333 (1980); *In re Baro*, 6 OCAHO 861, 1996 WL 430388, at *4 (May 16, 1996) (noting government's position that Mariel Cuban parolee was work authorized incident to status pursuant to 8 C.F.R. § 274a.12(a)(4)); *Federation for American Immigration Reform, Inc.* v. *Reno*, 93 F.3d 897, 898 (D.C. Cir. 1996) ("For decades Cuban citizens have taken dramatic—often fatal—risks to leave Cuba and get to the United States. When the United States rescued them at sea it would routinely 'parole' (release) them into the country and issue them work authorization, in contrast to the standard practice under international law of requiring a threshold showing of refugee status.").

and further "realiz[ed] that the interests of the United States would best be served" if Mariel Cuban parolees "were allowed to apply for lawful permanent residency in the United States." H.R. Rep. No. 99-682(I), *supra*, at 75. The Committee Report added that it was "time Cuban/Haitian Entrants are granted a status that is consistent *with the reality of their permanent residency in the United States*." *Id.* at 76 (emphasis added).

For all of these reasons, including the ties they have formed from living in our country for nearly a quarter of a century, this Court should at the very least "assimilate" the status of Mariel Cuban parolees for due process purposes "to that of . . . alien[s] continuously residing and physically present in the United Status." *Plasencia*, 459 U.S. at 33 (internal quotation marks and citation omitted); *see also United States ex rel. Paktorovics* v. *Murff*, 260 F.2d 610 (2d Cir. 1958) (extending due process protection to Hungarian refugees paroled into the United States in light of the invitation extended to them by the President and subsequent legislation providing for their adjustment to permanent residence).[42]

D. The Government's Purported Justifications For Indefinite Detention Of Inadmissible Aliens Are Especially Unpersuasive When Viewed In The Context Of Mariel Cuban Parolees.

The insufficiency of the government's justifications for indefinitely detaining inadmissible aliens is particularly apparent when viewed in the context of Mariel Cuban parolees.

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[42] In *Garcia-Mir* v. *Meese*, 788 F.2d 1446 (11th Cir. 1986) the Eleventh Circuit distinguished Mariel Cuban parolees from the Hungarian refugees in *Paktorovics* on the ground that in the case of the Mariels, Congress had not adopted legislation regularizing their status. *Id.* at 1451. Soon after the Eleventh Circuit decided that case, however, Congress enacted IRCA, which provided for the adjustment of resident status of the Mariel Cubans. The court also neglected to consider the fact that the Mariel Cubans were also permitted to adjust status pursuant to the Cuban Adjustment Act of 1966.

The government argues that indefinite detention of inadmissible aliens "effectuates the government's interest in preventing the aliens' unlawful entry into and physical presence in the United States in the first place . . . [and] thus implements the political Branches' power to exclude." Respondent's Cert. Brief at 18. As a threshold matter, this argument is merely a variant of the same justification this Court already rejected in *Zadvydas*.[43] However, the government's concerns are especially unwarranted in regard to inadmissible aliens like the Mariel Cubans. Indeed, as set forth earlier, the Mariel Cubans parolees' "entry and physical presence" in this country "in the first place" was not only authorized by the government, but in fact *encouraged*. *See generally* FIAC Brief; *see also* Open Arms Speech, *supra*; *cf. Paktorovics*, *supra*, (emphasizing that invitation by President to Hungarian parolee-refugees distinguished them from other inadmissible aliens).

Similarly, the government's argument that applying *Zadvydas* to inadmissible aliens will create an "unprotected spot in the nation's armor," Respondent's Cert. Brief at 15, carries little weight when used to justify the indefinite detention of Mariel Cuban parolees. As set forth above and explained more fully in the FIAC Brief, the Mariel boatlift was not the result of the unilateral action by a foreign dictator, but followed a long history of U.S. policy encouraging Cuban migration. Moreover, with the exception of a tiny

[43] In *Zadvydas*, the government argued that release of the petitioners who had been ordered removed would allow them to be present in the country when they had no right to be here. *Zadvydas*, 533 U.S. at 696. As this Court emphasized in response, although the government has the sovereign right to determine who may remain in the country and whom to remove, release under § 1231(a)(6) does not confer a legal right to "live at large," but merely a right to be "supervis[ed] under release conditions that may not be violated." *Id.* Similarly, release of inadmissible aliens under 1231(a)(6) does not constitute an "admission" but merely "release under conditions that may not be violated." *Id.* Thus, such release would no more undermine the sovereign power to exclude than release under *Zadvydas* undermines the sovereign power to remove.

fraction of refugees who were immediately detained and ordered excluded because of prior convictions or mental infirmiries, the rest of the refugees were welcomed into the country after being duly inspected and screened. *See* note 26, *supra*. This history therefore offers no support for the government's argument that the authority to indefinitely detain inadmissible aliens like Benitez is necessary to protect against "hostile governments" forcing us to admit "dangerous aliens" against our will. Respondent's Cert. Brief at 14.

Indeed, the government's interest in preventing the release of inadmissible aliens who pose a threat to national security is already addressed by 8 U.S.C. § 1226a(a)(6), which provides express authority to detain such individuals even when "removal is unlikely in the reasonably foreseeable future." *See* Section I (C), *supra*. In addition, as *Zadvydas* recognized, a range of other mechanisms exist for monitoring and apprehending inadmissible aliens who are released from indefinite detention. An inadmissible alien who is paroled out of indefinite detention is subject to continuous supervision and monitoring "under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696; *see also* 8 U.S.C. §§ 1231(a)(3), 1253; 8 C.F.R. §§ 212.5; 212.12. Following a violation of the parole conditions, an inadmissible alien can also be reincarcerated pursuant to 8 U.S.C. § 1253(b). Thus the government is not left "powerless." Respondent's Cert. Brief at 14.

Notably, for the past year and a half, the government has been applying *Zadvydas'* release requirement to inadmissible aliens in the Ninth Circuit in compliance with that Circuit's decision in *Lin Guo Xi* v. *INS*, 298 F.3d 832 (9th Cir. 2002), and for close to a year, to inadmissible aliens in the Sixth Circuit pursuant to *Rosales-Garcia* v. *Holland*, 322 F.3d 386 (6th Cir. 2003), *cert. denied*, 123 S. Ct. 2607 (2003). Apart from summarily stating that these decisions create an "unprotected spot in the Nation's armor," Respondent's Cert. Brief at 15, the government does not explain how national security has been compromised by its compli-

ance with these decisions, especially in light of the monitoring devices and other statutory provisions at its disposal.

CONCLUSION

For all of the reasons set forth above, amicus submits that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI FOR BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMERICAN IMMIGRATION LAW FOUNDATION LEGAL ACTION CENTER, PENNSYLVANIA IMMIGRATION RESOURCE CENTER, MIDWEST IMMIGRANT AND HUMAN RIGHTS CENTER, OFFICE OF THE FEDERAL DEFENDER FOR THE EASTERN DISTRICT OF CALIFORNIA, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND LUTHERAN IMMIGRATION AND REFUGEE SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. DUE PROCESS REQUIRES ADEQUATE PROCEDURAL SAFEGUARDS FOR INADMISSIBLE ALIENS FACED WITH INDEFINITE DETENTION. 7

A. Due Process Requires Procedures Sufficient To Protect Against The Government Unfairly Depriving Persons Of Liberty. 7

B. The Important Liberty Interest At Stake Requires That Mariel Cubans Receive Significant Procedural Protections. 8

C. The Government's Interest Lies Only In The Traditional Police Power Concern Of Preventing Danger To The Community. 10

II. THE ADMINISTRATIVE PROCEDURES FOR INDEFINITELY DETAINING MARIEL CUBANS DO NOT AFFORD ADEQUATE DUE PROCESS. 13

A. The Regulations Governing The Post-Removal Detention Of Mariel Cubans Provide Insufficient Procedural Protections. 13

TABLE OF CONTENTS—Continued

Page

B. The Government's Procedures For Deciding Whether Mariel Cubans Should Be Indefinitely Detained Do Not Withstand Due Process Scrutiny. 15

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Addington v. *Texas*, 441 U.S. 418 (1979) 20

Alba v. *McElroy*, No. 96 Civ. 8748 (DLC), 1996 WL 695811 (S.D.N.Y. Dec. 4, 1996) 18

Benitez v. *Wallis*, 337 F.3d 1289 (11th Cir. 2003) 10

City of Chicago v. *Morales*, 527 U.S. 41 (1999) 19

Crowell v. *Benson*, 285 U.S. 22 (1932) 19

Cruz-Taveras v. *McElroy*, No. 96 Civ. 5068 (MBM), 1996 WL 455012 (S.D.N.Y. Aug. 13, 1996) 18

Demore v. *Kim*, 538 U.S. 510, 123 S. Ct. 1708 (2003) 10, 18

Duong v. *INS*, 118 F. Supp. 2d 1059 (S.D. Cal. 2000) 17

Ekekhor v. *Aljets*, 979 F. Supp. 640 (N.D. Ill. 1997) 18

Foucha v. *Louisiana*, 504 U.S. 71 (1992) 9, 16, 19

Gomez-Chavez v. *Perryman*, 308 F.3d 796 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 53 (2003) 18

Kansas v. *Crane*, 534 U.S. 407 (2002) 18

Landon v. *Plasencia*, 459 U.S. 21 (1982) 7

Marcello v. *Bonds*, 349 U.S. 302 (1955) 18

Mathews v. *Diaz*, 426 U.S. 67 (1976) 7

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 6, 8

Phan v. *Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999) 17, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Phillips v. *Comm'r*, 283 U.S. 589 (1931) 19

Reno v. *Flores*, 507 U.S. 292 (1993) 17

Rosales-Garcia v. *Holland*, 322 F.3d 386 (6th Cir.), *cert. denied*, 123 S. Ct. 2607 (2003) 9

Sale v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) 5

Schall v. *Martin*, 467 U.S. 253 (1984) 16, 17

Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 5, 16, 17

South Carolina v. *Regan*, 465 U.S. 367 (1984) 19

St. John v. *McElroy*, 917 F. Supp. 243 (S.D.N.Y. 1996) 17

Superintendent, Mass. Correctional Institute v. *Hill*, 472 U.S. 445 (1985) 19

Thomas v. *McElroy*, No. 96 Civ. 5065 (JSM), 1996 WL. 487953 (S.D.N.Y. Aug. 27, 1996) 18

United States v. *Salerno*, 481 U.S. 739 (1987) 16, 17, 20

Zadvydas v. *Davis*, 533 U.S. 678 (2001) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. amend. V 7

8 U.S.C. § 1101(a)(13) 5

8 U.S.C. § 1182 ..... 5, 9, 10

8 U.S.C. § 1226 9

8 U.S.C. § 1231(a)(6) ..... *passim*

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Department of Defense Appropriation Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), amended by Pub. L. No. 104-302, 110 Stat. 3656 (1996) 4

Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 13

8 C.F.R. § 212.12 ..... *passim*

8 C.F.R. § 241.4(b)(2) 9, 15

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This *amici curiae* brief is submitted in support of the petitioner.[1] By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Immigration Law Foundation (AILF) is a non-profit organization founded in 1987 to increase public understanding of immigration law and policy, to promote public service and professional excellence in the immigration law field, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration. The AILF Legal Action Center is the litigation arm of the Foundation. Part of the Legal Action Center's work involves providing mentoring assistance and advice to immigration lawyers on wide-ranging immigration law issues including removal and detention.

The Pennsylvania Immigration Resource Center (PIRC) is a nonprofit, legal services organization founded in 1996 as a legal and educational resource center for immigrants in Bureau of Immigration and Customs Enforcement custody. PIRC's goal is to ensure access to justice for detained immigrants who face removal from the United States. To that end, PIRC delivers presentations, conducts pro se workshops, and provides individualized legal assistance to the detainee populations in Pennsylvania prisons. PIRC focuses its efforts on providing legal representation to particularly vulnerable immigrant populations, those populations that are typically unable to mount a successful defense against removal from the United States without representation. These populations include children, families, survivors of torture, survivors of domestic violence, and individuals with mental health concerns. In addition, PIRC provides legal assistance to detainees challenging their continued custody. Such challenges are frequently based on failures to receive requisite custody reviews or because release is constitutionally mandated.

The Midwest Immigrant and Human Rights Center (MIHRC), a program of Heartland Alliance for Human Needs and Human Rights, provides direct legal services to and advocates for impoverished immigrants, refugees, and asylum seekers. MIHRC, formerly known as Travelers and

Immigrants Aid, has worked with and represented low-income immigrants since 1881, including immigrants and asylum-seekers like Mr. Benitez, who are detained by the United States Bureau of Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service) because they cannot be removed from the country. MIHRC conducts legal rights presentations and individual legal consultations in various county jails throughout Illinois, Indiana, and Wisconsin, and litigates on behalf of immigrants in immigration courts and the federal courts, often in conjunction with local lawyers working pro bono publico. Through direct legal services and advocacy, MIHRC strives to advance local and international human rights and protections for immigrants, refugees and asylum seekers, including the right to be free from arbitrary or unreasonable detention.

Since 1998, the Office of the Federal Defender for the Eastern District of California has been appointed to represent hundreds of individuals detained by the Bureau of Immigrations and Customs Enforcement in federal habeas corpus cases challenging such detention. A substantial percentage of these individuals are persons deemed "inadmissible" or "excludable" by federal immigration officials who cannot be removed from the United States because their countries of birth will not accept them. As part of the office's representation of these individuals, staff lawyers and paralegals have assisted numerous Mariel Cubans in attempting to gain release from detention pursuant to the Mariel Cuban Review process. It is likely that this Court's decision in the current case will have an impact on the indefinite-detainee clients that the office represents.

The American Immigration Lawyers Association (AILA) is a national non-profit association of immigration and nationality lawyers. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than 8,500 members organized in thirty-five chapters across the United States and in Canada. AILA's mem-

bers' clients may be directly affected by the decision in this case.

Lutheran Immigration and Refugee Service (LIRS) is one of the nation's largest refugee resettlement agencies. In response to God's love in Christ, LIRS welcomes the stranger, bringing new hope and new life through ministries of service and justice. Through a network of twenty-seven affiliated agencies around the United States, LIRS resettles refugees, reunites families, promotes education and employment, and provides support necessary for early and continuing self-sufficiency of refugees, asylum seekers and immigrants. LIRS specializes in serving refugees, unaccompanied minors, immigrants in detention, asylees and other vulnerable populations of migrants.

Amici submit this brief to explain the inadequacies of the regulatory procedures governing the continued detention of inadmissible aliens like petitioner.

SUMMARY OF ARGUMENT

The Immigration and Nationality Act (INA) provides that certain aliens whom the Government has ordered removed from the United States "may be detained" beyond the statutory 90-day period in which the Attorney General must attempt to secure the alien's removal. 8 U.S.C. § 1231(a)(6).[2] In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court held that for all admitted aliens, Section 1231(a)(6) must be read to limit the Government's post-removal-period detention authority to a reasonable period in order to avoid serious constitutional questions. *Id.* at 692.

These questions arose, the Court reasoned, because the Government lacked a "sufficiently strong special justification

[2] The INA was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), enacted as Division C of the Department of Defense Appropriation Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), amended by Pub. L. No. 104-302, 110 Stat. 3656 (1996).

for indefinite detention" of admitted aliens. *Id.* at 690. The Court so concluded because, *inter alia*, the non-citizen status of admitted aliens did not itself justify indefinite detention, *id.* at 692-96, nor did that status create a "special circumstance" that could justify "preventative detention . . . of potentially *indefinite* duration," *id.* at 691 (emphasis in original). The Court reasoned, moreover, that the line of decisions, including *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), holding that aliens "stopped at the border" have no due process right to be allowed into the country does not apply to admitted aliens who have "effected an entry into the Untied States." *Id.* at 693.

This case requires the Court to determine whether *Zadvydas*'s construction of Section 1231(a)(6) as limiting any post-removal-period detention to a reasonable time applies to "inadmissible" aliens who were paroled into the country, such as petitioner.[3] *Amici* agree with petitioner that *Zadvydas*'s interpretation of Section 1231(a)(6) should apply to him, because it is the very statute under which the Government claims authority for his detention. *Amici* further agree with petitioner that this Court should either overrule *Mezei* or limit its holding, so as not to apply to paroled aliens like petitioner who, through parole, "effected an entry" into the United States.

[3] The IIRIRA refers to "inadmissible" aliens rather than the formerly accepted phrase "excludable" aliens. "Inadmissible" aliens encompasses both aliens who have not yet entered the United States (formerly referred to as "excludable") and individuals who entered the country illegally (formerly referred to as "deportable"). An "admitted" alien has legally entered the country. 8 U.S.C. § 1101(a)(13). Permitting aliens like Mr. Benitez to enter into the country under supervised parole is not "regarded as an admission of the alien." 8 U.S.C. § 1182(d) (1994); *see also Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993). Treating inadmissible aliens who have been legally paroled into the country as not having entered it is recognized as the "entry fiction" in immigration law. *See Zadvydas*, 533 U.S. at 693 (discussing this fiction under immigration law). Throughout this brief, *amici* refer to aliens in Mr. Benitez's situation as "inadmissible paroled" or "paroled" aliens.

Amici write separately to address the due process issue that would confront this Court should it conclude that (a) paroled aliens are "persons" protected by the Due Process Clause, but nevertheless (b) the Government may detain paroled aliens pursuant to Section 1231(a)(6) for longer than a reasonable period to effect removal and may do so for reasons other than to effect removal, such as because it believes that the alien is dangerous. *Amici* argue that, should this Court so conclude, the procedures under which the Government has detained petitioner and other paroled aliens are constitutionally inadequate.

The constitutional adequacy of those procedures under these assumptions is determined by application of the due process balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (*Mathews*).

1. *Mathews* requires this Court to evaluate the constitutional adequacy of the procedures at issue in light of the paroled alien's liberty interest, the Government's interest in detaining those aliens, and the probable value of additional procedures in decreasing the risk of erroneous deprivations. Even if this Court were to conclude (as it should not) that paroled aliens' status leaves them with a diminished liberty interest or provides the Government with an enhanced interest in regulating their freedom, the deprivation of liberty by confinement is a weighty one. Consequently, *Mathews* mandates a further determination—whether additional procedures are necessary to minimize the risk of erroneous detention decisions.

2. Additional procedures would minimize this risk. This Court's cases concerning other persons who, because of their special circumstances, may be subjected to long-term civil detention, show what the Due Process Clause requires here. At a minimum, the Government must (i) provide an adversary hearing before an impartial adjudicator, (ii) make its detention determination based on a clearly articulated standard, and (iii) bear the burden of demonstrating by at least clear

and convincing evidence that the detainee meets that detention standard. Additionally, when the Government provides only administrative procedures prior to detention, it must subject those decisions to judicial review.

The Government's regulations, however, do not provide paroled aliens with these procedural protections. Thus, even if the Government's indefinite detention of paroled aliens did not otherwise violate their substantive constitutional rights, the Government has failed to afford them due process of law.

ARGUMENT

I. DUE PROCESS REQUIRES ADEQUATE PROCEDURAL SAFEGUARDS FOR INADMISSIBLE ALIENS FACED WITH INDEFINITE DETENTION.

A. Due Process Requires Procedures Sufficient To Protect Against The Government Unfairly Depriving Persons Of Liberty.

The Fifth Amendment's Due Process Clause forbids the Government to "deprive" any "person . . . of . . . liberty . . . without due process of law." U.S. Const. amend. V. Presuming that this Court recognizes that Mr. Benitez is a "person" within the meaning of this Clause, the Government must provide him with constitutionally adequate procedures if it is lawfully to deprive him of his liberty. *See Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment . . . protects every one of these persons from deprivation of life, liberty, or property without due process of law.").

Whether particular procedures are constitutionally adequate depends on the circumstances. *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982). The inquiry requires the Court to consider, in the context of existing procedures, "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the

probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures." *Id.* (citing *Mathews*, 424 U.S. at 334-35). Ultimately, however, this Court's due process inquiry requires more than "ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." *Mathews,* 424 U.S. at 348.

As demonstrated below, there is a substantial risk that the Government's current procedures have erroneously deprived Mr. Benitez and other detained Mariel Cubans of their liberty. Those procedures permit the Government to detain these persons indefinitely based on a variety of factors, including past criminal conduct and suspicions of future dangerousness. They do not provide the minimal protections that this Court has required in the context of long-term civil detentions.[4] Because no legitimate governmental interest outweighs the probable value of requiring additional safeguards, and because the existing procedures create an unacceptably high risk that persons like Mr. Benitez are being imprisoned unfairly, the Government's post-removal detention procedures for inadmissible paroled aliens are constitutionally deficient.

B. The Important Liberty Interest At Stake Requires That Mariel Cubans Receive Significant Procedural Protections.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause pro-

[4] For the purposes of this analysis, *amici* presume, as this Court did in *Zadvydas,* that "[t]he proceedings at issue here are civil, not criminal, and . . . that they are nonpunitive in purpose and effect." *Zadvydas,* 533 U.S. at 690.

tects." *Zadvydas*, 533 U.S. at 690; *see also Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."). Absent a limiting construction by this Court, the federal statute and implementing regulations governing the detention of Mariel Cubans like Mr. Benitez provide no limit on how long such an individual can be detained. *See* 8 U.S.C. § 1226. The statute provides that certain inadmissible aliens, like Mr. Benitez, and certain removable aliens, like the aliens in *Zadvydas*, "may be detained beyond the [ninety-day] removal period." *Id.*[5]

The implementing regulations do not limit the length of detention, and thus Mr. Benitez's detention, like that of the aliens in *Zadvydas*, is potentially permanent.[6] As the Sixth Circuit has held, under the regulations governing detention of Mariel Cubans, "post-removal-period detainees may *only* be released on parole 'for emergent reasons or for reasons deemed strictly in the public interest.' 8 C.F.R. § 212.12(b)(1). Therefore, the likelihood that they will be detained indefinitely is much greater." *Rosales-Garcia* v.

[5] Section 1231(a)(6) provides in full:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

Mr. Benitez has been determined to be inadmissible under 8 U.S.C. § 1182.

[6] Mr. Benitez's detention is governed by the Cuban Review Plan, *see* 8 C.F.R. § 241.4(b)(2), but like the administrative regulations applicable in *Zadvydas*, there is no limit on the period of detention. *Compare* 8 C.F.R. § 241.4 (2001) *with* 8 C.F.R. § 212.12 (2004); *see also Rosales-Garcia* v. *Holland*, 322 F.3d 386, 412 (6th Cir.) (en banc) (analyzing the regulations applicable to Mariel Cubans), *cert. denied*, 123 S. Ct. 2607 (2003).

Holland, 322 F.3d 386, 412 (6th Cir.) (en banc) (emphasis in original), *cert. denied*, 123 S. Ct. 2607 (2003).

C. The Government's Interest Lies Only In The Traditional Police Power Concern Of Preventing Danger To The Community.

As the Government argued in *Zadvydas*, 8 U.S.C. § 1231(a)(6), which authorizes detention "beyond the removal period" and "release[]," "has two regulatory goals: ensuring the appearance of aliens at future immigration proceedings and [p]reventing danger to the community." 533 U.S. at 690 (internal quotation marks omitted). Neither goal is sufficient to support the detention of Mr. Benitez and similarly situated Mariel Cubans without greater procedural protections than those currently afforded such detainees under 8 C.F.R. § 212.12.

This Court has concluded that the first goal—ensuring the alien's appearance at future proceedings—should be afforded little weight when chances of the alien's removal are slim: "[B]y definition the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best." *Zadvydas*, 533 U.S. at 690. Because there is little chance that the Government will be able to remove persons like Mr. Benitez, it does not have a substantial interest in detaining those persons to ensure that they are available to be removed. *Id.*

The unremovable nature of persons like Mr. Benitez also diminishes the broad general interest in controlling immigration policy ordinarily enjoyed by the political branches. *Cf. Demore* v. *Kim*, 538 U.S. 510, ---, 123 S. Ct. 1708, 1716 (2003) ("any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government" (internal quotation marks omitted)). As the Court of Appeals recognized, Mr. Benitez, like other Mariel Cubans, cannot be removed "if his own country will not allow it." *Benitez* v. *Wallis*, 337

F.3d 1289, 1300 (11th Cir. 2003). Since this state of affairs is likely to persist for some time, Mr. Benitez and other Mariel Cubans are probably going to continue living in this country, as they have for the last twenty years. Under these circumstances, Government detention decisions are predictably far less about policies implicating foreign relations, the war power, or maintenance of a republican form of government, than about domestic policy and community protection. *Cf. Zadvydas,* 533 U.S. at 696.

In fact, the regulations governing when parole will be extended to Mariel Cubans like Mr. Benitez illustrate that the Government's interest is principally focused on whether the alien is, in the Government's view, dangerous. Parole can only be recommended if the Director or the Cuban Review Panel determines that: "(i) The detainee is presently a nonviolent person; (ii) The detainee is likely to remain nonviolent; (iii) The detainee is not likely to pose a threat to the community following his release; and (iv) The detainee is not likely to violate the conditions of his parole." 8 C.F.R. § 212.12(d)(2).

In making these determinations, the regulations require that the Director and Review Panel consider the following laundry list of factors:

> (i) The nature and number of disciplinary infractions or incident reports received while in custody;
>
> (ii) The detainee's past history of criminal behavior;
>
> (iii) Any psychiatric and psychological reports pertaining to the detainee's mental health;
>
> (iv) Institutional progress relating to participation in work, educational and vocational programs;
>
> (v) His ties to the United States, such as the number of close relatives residing lawfully here;

> (vi) The likelihood that he may abscond, such as from any sponsorship program; and
>
> (vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole.

8 C.F.R. § 212.12(d)(3).

These factors' plain focus is on whether the alien, if released, will endanger the community. In substantial part, they suggest that the Government decides whether the alien, if released, is likely to be dangerous based on the alien's "past history of criminal behavior," "disciplinary infractions or incident reports," "psychiatric and psychological reports," and on whether he is "likely to engage in future acts of violence[or] is likely to engage in future criminal activity."

The Government's detention regulation thus emphasizes that its decisions regarding whether to parole or detain Mariel Cubans like Mr. Benitez are most likely premised on considerations of community protection—the statute's second goal. Community protection alone, however, provides an insufficient Government interest to justify indefinite detention. This Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." *Zadvydas*, 533 U.S. at 691. As was the case in *Zadvydas*, "[t]here is no sufficiently strong special justification here for indefinite civil detention." *Id.* at 690.

In fact, the Government has not suggested a "strong special justification" or attempted to limit its indefinite detention of inadmissible aliens to those that are "specially dangerous individuals." Thus, even if these detentions can properly be viewed as nonpunitive (therefore civil rather than criminal), they should be held to offend the Constitution for the reasons stated in *Zadvydas*. *Id.* at 690-92.

At all events, this Court has consistently required the Government to provide robust procedural protections before detaining persons based on dangerousness. Thus, even if this Court concluded that the Government has greater authority to detain inadmissible aliens who it believes are "dangerous," and, therefore, that this case is not wholly on par with *Zadvydas*, that conclusion would be insufficient to relieve the Government of its duty to afford those aliens strong protections. For the reasons discussed below, the Government's existing detention scheme is constitutionally inadequate because it fails to provide minimally necessary procedures.

II. THE ADMINISTRATIVE PROCEDURES FOR INDEFINITELY DETAINING MARIEL CUBANS DO NOT AFFORD ADEQUATE DUE PROCESS.

A. The Regulations Governing The Post-Removal Detention Of Mariel Cubans Provide Insufficient Procedural Protections.

Once an inadmissible Mariel Cuban such as Mr. Benitez has been detained and ordered removed from the country, whether he will be granted supervised release or detained indefinitely is determined "by the Commissioner, acting through the Associate Commissioner for Enforcement." 8 C.F.R. § 212.12(b). Recommendations to the Associate Commissioner for Enforcement, or his designee, are made by a "Cuban Review Panel," consisting of "two persons" selected by the Director of the Cuban Review Plan, himself appointed by the Associate Commissioner for Enforcement. The members of the Cuban Review Panel are selected from the staff of the Bureau of Immigration and Customs Enforcement (ICE). *See* 8 C.F.R. § 212.12(d)(1).[7] If the two

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[7] On March 1, 2003, the Immigration and Naturalization Service (INS) was replaced by ICE, an agency within the newly created Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (codified at 6 U.S.C. § 251(2)).

ICE staff members cannot reach a unanimous recommendation, a third member is added to the Panel, either the Director or his designee who must also be an ICE staff member. *Id.*

To determine whether to recommend parole, the Cuban Review Panel or the Director initially reviews the detainee's paper files, which the Director establishes and maintains, *see* 8 C.F.R. § 212.12(c), (d)(4)(1), and applies the criteria described above, *see* 8 C.F.R. § 212.12(d)(2).

If parole is not recommended based on the review of the detainee's file, or if the recommendation for parole is rejected, then the detainee is "personally interview[ed]" by the Panel. 8 C.F.R. § 212.12(d)(4)(ii). The regulations do not require the Government to provide counsel to the detainees for these interviews. *Id.*[8] Although the regulations permit the detainee to submit oral or written information pertinent to his parole determination, they do not afford him the right to subpoena witnesses or other evidence. *Id.* The regulations also do not afford the detainee an opportunity to review the Government's evidence or his file. *Id.* Nor do they provide him an opportunity to cross-examine witnesses. *Id.*

In determining whether the Panel will recommend to the Associate Commissioner of Enforcement that the detainee should be paroled after a personal interview, the regulations direct the Panel to apply the same criteria and factors as those used in the initial review of the paper record. *See* 8 C.F.R. § 212.12(d)(2).

The regulations thus leave to immigration staff the task of applying the various criteria and factors in Section 212.12(d) to reach a conclusion regarding whether the alien should be paroled. And, although the regulations for Mariel

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Throughout this brief, *amici* refer to ICE and the Government interchangeably.

[8] Based on the *amici*'s experience, although detainees are entitled to have counsel present at interviews, in practice this is often difficult to obtain.

Cubans do not expressly address the burden or standard of proof, the Government has argued below that the procedures are similar to the procedures at issue in *Zadvydas*; those procedures expressly placed the burden on the detainees to demonstrate they should be paroled. *See* 8 C.F.R. § 241.4(d)(1); Respondent's Brief, Case No. 02-14324-BB, at p. 10 n.12. Moreover, based on *amici*'s experience, the Government in practice requires detained Mariel Cubans to bear the burden of proof.

Most importantly, as was the case with Mr. Benitez's review, regardless of whether the Panel recommends parole, the Associate Commissioner for Enforcement (or his designee) has complete discretion to deny parole. Nothing in the administrative procedures requires the Associate Commissioner to follow the recommendation. In fact, the procedures only state that he "*may, in the exercise of discretion*, grant parole to a detained Mariel Cuban for emergent reasons or for reasons deemed strictly in the public interest." *See* 8 C.F.R. § 212.12(b)(1) (emphasis added). Detainees who have been denied parole are not entitled to another parole review for a full year following the denial. *See* 8 C.F.R. § 212.12(g)(2). And, even if parole is granted, "[t]he Associate Commissioner for Enforcement may, in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, *or any other circumstance*, indicates that parole would no longer be appropriate." 8 C.F.R. § 212.12(e) (emphasis added).

B. The Government's Procedures For Deciding Whether Mariel Cubans Should Be Indefinitely Detained Do Not Withstand Due Process Scrutiny.

These procedures that the Government employs to decide whether it will indefinitely detain Mariel Cubans based on the regulations' various factors—the focus of which are on whether the alien is likely to commit crimes or endanger

the community if released—are constitutionally inadequate even presuming this Court concludes (as it need not and should not) that Mariel Cubans have a diminished liberty interest or that the Government has a heightened interest in curtailing their liberty. As Justice Jackson aptly remarked, "basic fairness in hearing procedures does not vary with the status of the accused." *Mezei*, 345 U.S. at 225 (Jackson, J., dissenting).

Regardless, the Government's detention procedures are deficient because they do not meet the minimum protections that this Court has held are constitutionally required when the Government subjects even those persons who present a special danger to themselves or to their community to long-term civil detentions. Those constitutionally-required minimum protections include the following.

Adversary hearing before an impartial adjudicator. This Court has consistently held that full adversary hearings before impartial adjudicators must be afforded persons threatened with indefinite civil detention. For example, in *Foucha*, 504 U.S. at 72, this Court held unconstitutional the detention of an insanity acquittee who was no longer mentally ill but remained dangerous. The Court stated that the procedural protections were "not carefully limited" at least in part because the detainee was "not ... entitled to an adversary hearing." *Id.* at 81; *see also Schall* v. *Martin*, 467 U.S. 253 (1984) (upholding civil confinement of juveniles under statute that allowed for full adversarial hearings within three days of initial detention).

Inadmissible aliens are not afforded full adversary hearings. Although they are permitted to submit information, they do not have the opportunity to subpoena witnesses or cross-examine adverse witnesses. *Compare United States* v. *Salerno*, 481 U.S. 739 (1987) (adult pre-trial detention statute that, *inter alia*, provided detainees the opportunity to testify and present witnesses, proffer evidence, and cross-examine other witnesses satisfied due process requirements). These

opportunities are constitutionally required. *See Mezei*, 345 U.S. at 225 ("The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one's behalf, is especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed.") (Jackson, J., dissenting).

Mariel Cubans are also not afforded the opportunity to have their parole eligibility determined by an impartial adjudicator. An impartial decision maker is a due process touchstone. *See, e.g.*, *Salerno*, 481 U.S. at 742 (statute providing right to hearing before an impartial adjudicator); *Schall*, 467 U.S. at 270 (hearing before impartial family court judge); *Reno* v. *Flores*, 507 U.S. 292, 308 (1993) (upholding INS custody of alien juveniles prior to deportation hearings where detainee had right to custody hearing before an immigration judge). The persons who decide whether Mariel Cubans are eligible for parole cannot be presumed to be impartial. Those decisions are made by ICE officers—Cuban Review Panel members and the Associate Commissioner for Enforcement, or his designee.

Indeed, a number of federal courts have held that such officers are not sufficiently impartial because of political and community pressure to detain aliens with criminal histories. *See Phan* v. *Reno*, 56 F. Supp. 2d 1149, 1157 (W.D. Wash. 1999) (en banc) ("Due to political and community pressure, the INS, an executive agency, has every incentive to continue to detain aliens with aggravated felony convictions, even though they have served their sentences, on the suspicion that they may continue to pose a danger to the community." (quoting *St. John* v. *McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996)), *aff'd on other grounds*, *Zadvydas*, 533 U.S. 678.[9] Many of these courts have concluded that, as with

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[9] *See also, e.g.*, *Duong* v. *INS*, 118 F. Supp. 2d 1059, 1067 (S.D. Cal. 2000) (Finding due process violation based, *inter alia*, on "fact that the final decision of whether to release the alien is made by the INS Dis-

the decision to continue the detention of Mr. Benitez, immigration officers "simply relied on the aliens' past criminal history and the fact that they were facing removal from the United States, summarily concluding that the aliens posed such risks and denying them release." *Phan*, 56 F. Supp. 2d at 1157; *see also* cases cited *supra* note 9.[10]

Clear standard permitting judicial review. Due process requires that detention decisions be based on application of a clear standard. *Cf. Kansas* v. *Crane*, 534 U.S. 407, 413 (2002) (holding that individual could be subject to involuntary commitment only if the Government shows mental con-

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trict Director instead of an impartial party such as a judge or jury"); *Ekekhor* v. *Aljets*, 979 F. Supp. 640, 644 (N.D. Ill. 1997) (noting bias by INS officials and finding due process violation); *Alba* v. *McElroy*, No. 96 Civ. 8748 (DLC), 1996 WL 695811, at *3 (S.D.N.Y. Dec. 4, 1996) (requiring a parole hearing before an impartial adjudicator with an "unbiased view"); *Thomas* v. *McElroy*, No. 96 Civ. 5065 (JSM), 1996 WL 487953, at *3 (S.D.N.Y. Aug. 27, 1996) (noting the potential partiality of INS officials and calling for a parole hearing before an "impartial adjudicator"); *Cruz-Taveras* v. *McElroy*, No. 96 Civ. 5068 (MBM), 1996 WL 455012, at *4 (S.D.N.Y. Aug. 13, 1996) (noting "little confidence" that alien was afforded due process and requiring "a hearing before an impartial Immigration Judge").

[10] The Seventh Circuit has suggested that *Marcello* v. *Bonds*, 349 U.S. 302 (1955), stands for the proposition that there is no presumption of bias for any immigration officer. *See Gomez-Chavez* v. *Perryman*, 308 F.3d 796 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 53 (2003). In *Marcello*, this Court rejected a due process challenge where Congress had clearly created a "specially adapted" system that balanced the interests of the Government with the obligation of fairness to the immigrant. *Marcello*, 349 U.S. at 310. The procedures included among other things, a requirement "that decisions of deportability be based upon reasonable, substantial and probative evidence"; evidentiary procedures that guaranteed a meaningful right to be heard; and a right to appeal. *Id.* at 307-10 (quotation marks and citations omitted). Unlike here, the case did not involve indefinite detention decisions made by officials with unbridled discretion. *Cf. Demore*, 123 S. Ct. at 1726 (Souter, J., concurring in part and dissenting in part) (noting in case involving alien's due process claim that in that case "there is no occasion to enquire whether due process requires access to any particular arbiter, such as one unaffiliated with the INS").

dition resulting in serious difficulty in the individual controlling dangerous behavior). Indeed, in the absence of a clear standard, the Government's detention determinations may be wholly arbitrary and effectively unreviewable. *Cf. City of Chicago* v. *Morales*, 527 U.S. 41 (1999) (due process requires minimum guidelines to prevent arbitrary and discriminatory enforcement).

Here, where detention determinations are made in the first instance by an administrative body, those determinations must be subject to meaningful judicial review. As this Court stated in *Zadvydas*, "the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights." *Zadvydas*, 533 U.S. at 692 (quoting *Superintendent, Mass. Correctional Inst.* v. *Hill*, 472 U.S. 445, 450 (1985), and citing *Crowell* v. *Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) ("[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process.")). "The Constitution demands greater procedural protection even for property." *Zadvydas*, 533 U.S. at 692 (citing *South Carolina* v. *Regan*, 465 U.S. 367, 393 (1984) (O'Connor, J., concurring in judgment); *Phillips* v. *Comm'r*, 283 U.S. 589, 595-97 (1931) (Brandeis, J.)).

Meaningful judicial review—even the limited review that the Government asserts is the only review available—is impossible in the absence of a hearing resulting in a written decision applying an articulated standard. In the absence of these procedures, any review would, at best, be limited to whether immigration officials abused their discretion in levying what could effectively be a life sentence.

Government's burden of proof. Finally, in the civil detention context, this Court has repeatedly held that due process requires that the Government bear the burden of demonstrating by at least clear and convincing evidence that the detainee meets the detention requirements. *See Foucha*, 504 U.S. at 81-82 (detention of insanity acquittee violated due

process because, *inter alia,* statute placed burden on detainee to prove that he was not dangerous); *Addington* v. *Texas*, 441 U.S. 418 (1979) (due process requires a clear and convincing evidence standard before an individual may be detained under civil confinement); *cf. Salerno,* 481 U.S. at 742 (referencing the clear and convincing evidence standard in upholding adult pre-trial detention statute).

By contrast, as noted above, detained Mariel Cubans have the burden of proving they should not be detained. This requirement alone renders the available procedures constitutionally defective. As this Court stated in *Zadvydas*, where the burden is on the detainee to demonstrate that his release on parole is justified, a serious constitutional question arises. *Zadvydas*, 533 U.S. at 692. As noted above, even were the burden the Government's, the Associate Commissioner has complete discretion to ignore any results of the review process and continue the detention of the alien. This discretion effectively eliminates any burden on the Government to demonstrate that detained Mariel Cubans meet an articulated standard believed to justify their detention for reasons other than effecting their removal.

Ultimately, this Court must determine what process is due by weighing (a) the interest of inadmissible aliens, like Mr. Benitez, in supervised release instead of indefinite detention, where there is little likelihood of removal to another country, against (b) the Government's interest in keeping such individuals in indefinite, perhaps permanent, detention. *Amici* respectfully submit that, based on the significant deprivation of liberty suffered by these aliens compared to the Government's limited interest in detention, the Due Process Clause requires procedural protections that are far closer to those that this Court has traditionally found necessary to justify civil confinement. There is no sound precedent for holding that the procedures applicable to detained Mariel Cubans like Mr. Benitez afford due process of law.

CONCLUSION

For these reasons, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

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In The Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, Interim Field Office Director, Miami, for Bureau of Immigration and Customs Enforcement,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE FLORIDA IMMIGRANT ADVOCACY CENTER AND RAFAEL PEÑALVER IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. Parole Has Historically Been Used to Facilitate the Permanent Resettlement of Large Refugee Groups in the United States	3
A. The Government Begins to Turn to Parole When Other Mechanisms Prove Inefficient or Impractical	5
B. The Government Begins to Systematically Use Parole to Resettle Refugee Groups	7
II. Events Leading Up to the Mariel Boatlift: The U.S. Government Encourages Departures From Cuba and Welcomes Cuban Refugees Fleeing Castro's Communist Government	9
III. The Mariel Cubans Are Welcomed by President Carter, Paroled Into the United States as a Step Towards Resettlement, and Treated Like Prior Groups of Refugees	16
A. The Carter Administration Receives All Cubans Who Depart from the Port of Mariel	17
B. The Carter Administration Renews Attempts to Stop the Boatlift and Replace it With a Safe and Orderly Airlift	22
C. The Government Paroles the Cuban Arrivals Into the Country as a Step Toward Permanent Residency	23

TABLE OF CONTENTS – Continued

Page

D. The Government Takes Measures to Facilitate the Permanent Resettlement of the Mariel Cubans, Like That of Earlier Groups of Refugees 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

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Page

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Page

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Page

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Page

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Page

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae Florida Immigrant Advocacy Center (FIAC) and Rafael Peñalver[2] are concerned with the possible indefinite detention of Mariel Cubans and other refugees or displaced persons who came into the United States under the Attorney General's parole authority. Amici are interested in ensuring that the Court is fully and accurately informed respecting the historical use of parole to resettle large groups of refugees in the United States. Amici are also interested in presenting to the Court the circumstances under which Cubans have emigrated to the country both before and during the Mariel boatlift. Amici believe that the circumstances under which Mariel Cubans came to the U.S. and how these circumstances are connected to the historical use of parole to resettle refugees and other displaced persons, including Cubans, are crucial to the Court's determination of this case.

SUMMARY OF THE ARGUMENT

Central to the issues in this case is the use of the Attorney General's parole authority to allow large groups of refugees[3] and other displaced persons into the United

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[1] Counsel for amici state that no counsel for a party authored this brief in whole or in part and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the written consent of the parties to the filing of this brief are being filed with the Clerk of the Court concurrently with filing.

[2] The separate statements of interest of each amicus are included in Appendix A.

[3] The term "refugee" is generally used in this brief, as it was used by the U.S. Government for many years, to represent persons displaced from their country of origin or habitual residence who are afraid to return due to persecution. The term did not take on more specific legal

(Continued on following page)

States. Originally meant as a tool to cope with individual emergencies, the parole provision allowed temporary release from detention with the presumption that the release would soon expire, all the while keeping the alien "at the border" for immigration purposes. During large-scale refugee crises, however, the Government came to see parole as a flexible legal mechanism for inviting refugees to the country with the aim of resettling them. When immigration provisions or special legislation proved insufficient or cumbersome, the Government increasingly turned to parole as a substitute "initial vehicle for admission," followed almost invariably by legislation providing permanent residence. Parole was not used to keep refugees "at the border," presuming eventual re-detention. For refugees, parole was simply an alternative to other forms of admission and a first step towards permanent resettlement.

This use of parole was employed for decades to admit and resettle Cuban nationals fleeing Fidel Castro's Communist government. Indeed, the U.S. Government in many ways encouraged the emigration of Cubans to the U.S., both as a way to assist persons fleeing persecution and as a means to destabilize the Cuban government. Between 1960 and 1979, the Government provided flights and foster care to thousands of unaccompanied Cuban children; waived visa requirements for Cubans who could not obtain visas; welcomed those who arrived on a boatlift from Camarioca, Cuba; replaced this boatlift with an eight-year-long airlift, known as the "Freedom Flights," that brought over 260,000 Cubans to the country; and welcomed Cubans who came to the U.S. illegally, even hijackers. Over 690,000 Cubans emigrated to the U.S. for

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significance until Congress defined it in various acts, especially the Refugee Act of 1980.

resettlement during this period, most via parole. Through the Cuban Refugee Program the Government provided these parolees with resettlement assistance, welfare, food stamps, health care, and other benefits. With passage of the "Cuban Adjustment Act" in 1966, Cuban parolees were provided with the means to obtain permanent residence without complying with standard immigration procedures.

In 1980, Cuban nationals began to arrive in the U.S. through a boatlift from Mariel, Cuba. Efforts were made by the U.S. Government to stop the boatlift and institute an ongoing airlift in its place, much like the Freedom Flights of the 1970s. For many reasons, however, these efforts were largely unsuccessful. By the time the port of Mariel was finally closed, 125,000 Cubans had made their way to the United States. Having said that the U.S. would welcome them with "an open heart and open arms," President Carter paroled the vast majority of them into the country upon arrival. As with prior refugees, the Government used parole to further resettlement. The President called on Congress to pass special legislation recognizing a special status for Mariel Cubans and providing them with permanent residency. Within months they were provided with a full range of public benefits. And within a few years they were adjusting to permanent residence under the Cuban Adjustment Act and the Immigration Reform and Control Act of 1986.

ARGUMENT

I. Parole Has Historically Been Used to Facilitate the Permanent Resettlement of Large Refugee Groups in the United States.

With the "Act of June 27, 1952," Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952), Congress first incorporated into statutory law the long-standing administrative practice of authorizing the temporary parole of aliens

into the United States when emergent reasons required entry:

> The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission.

INA § 212(d)(5) (1952); 8 U.S.C. § 1182(d)(5) (1952). *See also* Cong. Research Serv., Library of Cong., *Review of U.S. Refugee Resettlement Programs and Policies*, 7-8 (1980) [hereinafter "Cong. Research Serv."].

Before the Act, immigration officials had used parole to cope with individual emergency situations, such as when an alien was in need of medical care. E.P. Hutchinson, *Legislative History of American Immigration Policy: 1798-1965*, at 561 (1981). Parole allowed the alien temporary entry, with the understanding that she would be redetained as soon as her purpose for entry was accomplished. Based on this past use, as well as the text and legislative history of the provision, many in Congress believed that the new parole provision was meant to apply in similar instances, on "a case-by-case basis." Cong. Research Serv., at 8; H. Rep. No. 82-1365, at 1706 (1952). The measure was not meant to authorize large-scale admissions to the country.

In time, however, Government officials came to see parole as a flexible tool for furthering the resettlement of refugees. When immigration provisions or special legislation

were unable to deal with refugee crises, the Government employed parole as an alternative means to invite refugees to the country. Under these circumstances, the Government did not use parole as it had been used before – to allow individuals temporary entry with the presumption of re-detention. The aim was to provide for permanent stay.

A. The Government Begins to Turn to Parole When Other Mechanisms Prove Inefficient or Impractical.

Up until 1980, the U.S. Government used a predominantly ad hoc approach to refugee admissions. With no specific legal provisions addressing refugee admission, refugees were originally admitted under standard immigration procedures. Cong. Research Serv., at 1-4. But these procedures were too restrictive for the immediate admission of large numbers of refugees. *Id.* Stirred by the great numbers of displaced persons in Europe after the Second World War, the Government turned to special legislation authorizing large-scale refugee admissions outside normal immigration channels. At times, as with the Displaced Persons Act of 1948, refugee admissions were charged against current or future national immigration quotas. Act of June 25, 1948, Pub. L. No. 80-774, § 3, 62 Stat. 1009, 1010 (1948). But by 1951, the over 400,000 admissions under the Displaced Persons Act had mortgaged 50% of the quotas of some countries as far as the year 2274. Cong. Research Serv., at 7; H.R. Doc. No. 84-329, at 3 (1956). At other times, as with the Refugee Relief Act of 1953, refugees were permanently resettled in the United States outside the normal quota limitations, pursuant to "special nonquota immigrant visas." Act of Aug. 7, 1953, Pub. L. No. 83-203, § 3, 67 Stat. 400, 401 (1953).

Special legislation, however, proved insufficient or impractical in the face of refugee emergencies. In such

cases, the Government turned to the parole provision as a substitute mechanism for admission. For example, through the Refugee Relief Act of 1953, Congress originally authorized 4,000 special non-quota immigrant visas to orphans adopted by U.S. citizens. *Id.* at § 5, 67 Stat. at 402. But by September 26, 1956, the 4,000 visas had been allotted while many eligible orphans remained. Hutchinson, at 562; Elizabeth J. Harper, *Immigration Laws of the United States* 511 (3d ed. 1975). Deeming the situation an emergency, the Government turned to the Attorney General's parole authority to admit the remaining orphans, 923 in all. E.P. Hutchinson, at 562. Congress provided legislation granting them the means to obtain permanent resident status a few months later. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 4(d), 71 Stat. 639, 710 (1957).

Additionally, in October 1956, a Communist revolution in Hungary had displaced tens of thousands of persons, but special legislation was not possible, as Congress was out of session. Harper, at 511. In order to help relieve the crisis, President Eisenhower announced that the U.S. would accept 21,500 Hungarian refugees. Cong. Research Serv., at 9. Of these, 6,500 were to be admitted using visas still available under the Refugee Relief Act, and the remaining 15,000 were to be paroled into the country. *Id.* By 1958, approximately 38,000 Hungarian refugees had entered the United States, almost 32,000 of them under the parole provision. *Id.* That same year, Congress passed the Act of July 25, 1958 to provide permanent residence to these refugees. Pub. L. No. 85-559, §2, 72 Stat. 419, 419-20 (1958). Under the Act, the refugees were exempted from complying with certain documentary requirements for immigration. *Id.*

In both situations, special legislation had proved insufficient or unavailable, and the Government turned to parole as a substitute mechanism for admission. But, after the Hungarian incident, controversy arose over whether

the parole provision could legally be used on behalf of large numbers of refugees. Harper, at 504-11. According to the view of many in Congress, the parole statute did not provide authority "for the immigration of classes or groups outside the limit of the law." S. Rep. No. 89-748, at 17 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3335. Yet over the years, both the legislative and executive branches continued to use parole for this purpose. Requiring flexibility in refugee emergencies, the Government used parole as the "initial vehicle for admission," followed by legislation providing permanent residence. Cong. Research Serv., at 1.

B. The Government Begins to Systematically Use Parole to Resettle Refugee Groups.

With the Fair Share Act of 1960, the U.S. began to regularly employ parole as a first step toward refugee resettlement. Act of July 14, 1960, Pub. L. No. 86-648, § 1, 74 Stat. 504 (1960). Responding to a refugee crisis in Europe after the Second World War, Congress explicitly authorized the Attorney General to parole under section 212(d)(5) of the INA an unlimited number of eligible "refugee-escapees." *Id.* The Act also enabled those who were paroled under its provisions to obtain permanent residence after two years. *Id.* at §4, 74 Stat. at 505. As with the Hungarian refugees, the parolees were exempted from complying with some of the INA's documentary requirements. *Id.*; Cong. Research Serv., at 10. A total of 8,260 individuals were paroled into the country under this Act. Hutchinson, at 563.

On May 23, 1962, President Kennedy authorized another parole program to assist large numbers of Chinese nationals who had fled from the Chinese Mainland into Hong Kong. 1966 Annual Report of the Immigration and Naturalization Service 7 (1966) [hereinafter "1966 INS Report"]; 46 Dep't State Bull. No. 1199, at 994 (June 18,

1962) (statement of W. Averell Harriman, Assistant Secretary for Far Eastern Affairs). By the end of 1965, a total of 15,111 Chinese refugees had been paroled into the country for resettlement. 1966 INS Report, at 7; Harper, at 513. Of these, 9,126 were granted permanent residence by the end of 1966. 1966 INS Report, at 7. Representative Francis Walter observed at the time that this use of the parole authority served as "a permanent instrumentality for taking care of unforeseen situations" by the Executive Branch. Harper, at 513.

And parole was again used to resettle over 360,000 Indochinese refugees between 1975 and mid-1980. Following Communist takeovers in Vietnam, Cambodia, and Laos, Indochinese refugees were eligible for "conditional entries." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (1965) (codified at INA § 203(a)(7) (1966)). Similar in mechanism to parole, conditional entries were available in limited numbers to refugees in the Eastern Hemisphere fleeing any "Communist or Communist-dominated country." *Id.* But the number of available conditional entries was vastly exceeded by the number of refugees the U.S. chose to accept. Cong. Research Serv., at 13. The first use of parole was approved in 1975 to assist some 130,000 refugees who were evacuated from Indochina when the U.S. withdrew from Vietnam. *Id.* After admission of most of these refugees on parole, the Attorney General authorized or extended parole programs ten times – three times in 1975, once in 1976, once in 1977, three times in 1978, and twice in 1979 – each time to deal with a new and unexpected refugee emergency. *Id.* at 13-14.

Further, by this time the Fair Share Act had amended the INA's permanent adjustment of status provision to extend eligibility for adjustment to all persons "paroled" into the United States. Pub. L. No. 86-648, § 10, 74 Stat. 504, 505. Under this provision, parolees not otherwise covered by special legislation could now seek adjustment,

but only "within the numerical limitations and other restrictions imposed on immigration generally." Cong. Research Serv., at 16. To circumvent these restrictions, Congress provided Indochinese refugees with special legislation authorizing permanent residence outside of the INA's numerical limitations and exempting them from documentary requirements and other exclusion provisions. Act of October 28, 1977, Pub. L. No. 95-145, § 101, 91 Stat. 1223 (1977). Congress had again demonstrated that use of parole for refugees was meant as a step towards permanent residency in the United States.

II. Events Leading Up to the Mariel Boatlift; The U.S. Government Encourages Departures From Cuba and Welcomes Cuban Refugees Fleeing Castro's Communist Government.

Since Communism was imposed by Fidel Castro in Cuba, the United States has treated Cubans fleeing his dictatorship as refugees, welcoming them into the country for resettlement. Indeed, for many years, the U.S. Government assisted and even encouraged emigration from Cuba, using the departures to destabilize Castro's government, demonstrate the flaws of Communism, and assist those seeking freedom. Parole was an integral part of this process.[4] Between 1962 and the end of May 1979, over 690,000 Cuban nationals were paroled into the country, "the largest number of refugees from a single nationality ever accepted into the United States." Cong. Research Serv., at 13. As with the long line of refugees

[4] Because Cubans were not eligible for conditional entry – as the provision applied only to those from Eastern Hemisphere countries – the parole provision was the main mechanism available to allow Cubans into the United States. Cong. Research Serv., at 13.

that came before them, parole was used on behalf of Cubans as a means toward resettlement.

President Eisenhower began the tradition of encouraging emigration from Cuba in 1960. Immediately after Castro converted to Communism, the President instituted the Cuban Children's Program, commonly known as operation "Peter Pan," to save Cuban children from Communist indoctrination. Felix Masud-Piloto, *With Open Arms: Cuban Migration to the United States* 39-41 (1988); *On the Way: A Wave of Cuban Children*, U.S. News & World Rep., Mar. 19, 1962, at 16. Breaking with prior U.S. immigration policy, the program transported unaccompanied Cuban children between the ages of six and sixteen to the country and placed them in foster care, all at the federal government's expense. Masud-Piloto, at 39-41. Over 14,000 children entered the country through this program. *Id.* at 41.

President Eisenhower continued the tradition the following year. On January 3, 1961, the U.S. broke diplomatic ties with Cuba, leaving those within Cuba no means to acquire visas to the United States. *Id.* at 34; David W. Engstrom, *Presidential Decision Making Adrift: The Carter Administration and the Mariel Boatlift* 14-16 (1997). In response, the Government waived all visa requirements for Cubans, prompting historian David W. Engstrom to label this as "a most dramatic example of bending immigration policy to meet a United States foreign policy objective."[5] Engstrom, at 16. Although the

[5] Regarding renewed departures from Cuba after its Communist conversion, President Eisenhower stated that Americans had "opened their homes and hearts" to Hungarian refugees in the 1950s and the U.S. "will do no less for these distressed Cubans." Statement by the President on Releasing a Report on Cuban Refugee Problems, 1960 Pub. Papers 1059, ¶ 431 (Jan. 18, 1961).

statutory provision provided authority for visa waivers "on the basis of unforeseen emergency in *individual* cases," by 1962 the U.S. had issued over 400,000 visa waivers to Cubans. 8 U.S.C. § 1182(d)(4)(A) (1961) (emphasis added); *The Cuban Refugee Problem: Hearings Before the Subcomm. on Refugees and Escapees of the Senate Comm. on the Judiciary*, 87th Cong. 307-308 (1962) [hereinafter "*Hearings on Refugees and Escapees*"]. Further, because visa waivers allowed Cubans to travel to the U.S. but not stay, those who arrived with visa waivers were given parole or indefinite voluntary departure, allowing those who entered on visa waivers to stay indefinitely. Engstrom, at 16.

After Eisenhower left office, President Kennedy increased the push for emigration from Cuba. On February 3, 1961, two weeks into his term, President Kennedy directed the Secretary of Health Education and Welfare to create a "Cuban Refugee Program" to provide resettlement assistance and a wide range of social services to Cuban refugees. John F. Thomas, *Cuban Refugee Program* 1-8 (1963) (*reprinted in Cuban Refugee Programs* (Carlos E. Cortes ed. 1980)). Later that year, to resolve the fact that many Cubans with U.S. visas or visa waivers were stuck in Cuba due to the cost of airfare, the President proposed a free airlift, at a cost of $350,000 to the Government. Masud-Piloto, at 52. The President also asked Congress for additional funds to meet "unexpected refugee migration problems," reminding Congress that "this country has always served as a lantern in the dark for those who love freedom but are persecuted, in misery, or in need." *Id.*

The following year, President Kennedy specifically noted the Cuban Refugee Program's importance in the fight against Communism and raised its budget almost

900 percent.[6] Masud-Piloto, at 50-53; *see also* Thomas, at 5 (noting that budget was raised from approximately $4 million in 1961 to over $38.5 million in 1962). It was speculated that President Kennedy meant to stimulate Cuban migration in order to undermine the Cuban revolution, by creating dissent, draining human resources, and creating negative publicity worldwide. Masud-Piloto, at 50-54; Engstrom, at 21; 44 Dep't State Bull. No. 1141, at 661 (Apr. 18, 1961) (letter from Kennedy to Nikita Khrushchev noting the importance that Cuban refugees have in "assist[ing] their fellow Cubans in their struggle for freedom").

In October 1962, after the Cuban Missile Crisis, flights between Cuba and the U.S. were canceled and official emigration from Cuba was slowed. *Hearings on Refugees and Escapees*, at 306-307. The U.S. Government, however, continued to welcome any Cuban who arrived – by legal or illegal means. Between 1962 and 1965, almost 30,000 Cubans emigrated to the U.S., many on small boats. *Id.* at 4; Engstrom, at 18 & n.33. Those who escaped Cuba and fled across the Florida Straits received assistance from the U.S. Coast Guard and a hero's welcome in Miami. Engstrom, at 18. And in cases where Cubans were smuggled to the U.S. by their Cuban-American relatives, the U.S. did not enforce its laws against alien smuggling. *Staff Hiked to Handle Exile Flow*, Miami Herald, Oct. 7, 1965, at A1 ("It is an open secret that in the past exiles from here have gone into Cuba, returning with scores of new escapees. Immigration regulations have not been strictly enforced for 'humanitarian reasons.'").

[6] During its 15-year history, the program aided more than 700,000 Cubans, at a cost of more than a billion dollars to the United States. Masud-Piloto, at 54.

each of these Cubans was immediately paroled and allowed to remain, the President's actions were viewed as a "policy of unconditional welcome [that] created the belief among Cuban-Americans that the federal government would sanction any effort to expedite departures from the island." Engstrom, at 18.

In September 1965, Castro announced his plans to reopen emigration from Cuba. He declared that any Cuban citizen who wanted to leave could do so through the port of Camarioca, which he would open on October 10. *Castro Tells Rally Cubans Are Free to Leave Country*, N.Y. Times, Sept. 30, 1965, at 1; Wayne S. Smith, *The Closest of Enemies* 90 (1987). The State Department responded that any Cubans permitted to leave would be admitted to the U.S., pointing out that U.S. "policy has always been to admit bona fide refugees from Communist oppression." *U.S. Studies Proposal*, N.Y. Times, Sept. 30, 1965, at 2; John M. Goshko, *State Dept. Is Evaluating Castro Offer on Refugees*, Wash. Post, Sept. 30, 1965, at A18. Soon thereafter, Cuban-Americans set sail to Camarioca in hundreds of small boats to pick up their family and friends. Engstrom, at 25. Over the next month, 2,866 undocumented Cubans were brought to the U.S. and processed by INS. *Id.*

Explicitly welcoming the Cuban refugees, who had been labeled "counter-revolutionaries," "worms," and "antisocials" by Castro, the Johnson Administration proposed an "orderly departure" program, setting no limits on the number of entrants the U.S. would accept. Masud-Piloto, 62, 65. On October 3, 1965, in a speech beneath the Statue of Liberty, President Johnson stated:

> I declare this afternoon to the people of Cuba that those who seek refuge here in America will find it. The dedication of America to our tradition as an asylum for the oppressed is going to be upheld.

Remarks at the Signing of the Immigration Bill, 2 Pub. Papers 1040 (Oct. 3, 1965). The following day, the Administration began negotiating with Castro to institute an ongoing airlift to bring Cubans to the United States. Engstrom, at 24; Richard Eder, *Havana Accepts Some U.S. Terms on Refugee Plan*, N.Y. Times, Oct. 14, 1965, at 1.

As negotiations continued, the U.S. attempted to slow the boatlift by threatening civil fines, boat seizures, and imprisonment – partially in response to the physical danger associated with the boatlift. Engstrom, at 25; Masud-Piloto, at 61; Jon Nordheimer & Lee Winfrey, *Exiles Dock in Cuba, Ignore U.S. Warning,* Miami Herald, Oct. 9, 1965, at A1. But these legal sanctions were largely unenforced, as they had been before the boatlift, and failed to serve as a deterrent. Although the Government threatened boat operators, it continued to welcome and accept the Cuban refugees brought in on these boats. Engstrom, at 25. And although the U.S. initially impounded several boats, it returned the boats to their owners a few days later and never fined or prosecuted any of the boat owners. *Id.* at 26 & n.89.

The Johnson Administration finally signed a Memorandum of Understanding with the Cuban government on November 6, which replaced the boatlift with an airlift program that would bring 3,000 to 4,000 Cubans to the U.S. every month. 53 Dep't State Bull. No. 1379, at 850-52 (Nov. 29, 1965); Richard Eder, *U.S. and Castro Agree to Start Refugee Airlift*, N.Y. Times, Nov. 7, 1965, at 1. The U.S. also agreed to institute a sealift to bring over the thousands of Cubans who had been left behind at Camarioca after Castro closed down the port. Engstrom, at 27. Both lifts began on December 1, 1965. *Id.* at 27, 29. The airlifts, known as the "Freedom Flights," would bring over 260,000 Cuban refugees fleeing persecution to the U.S. over the next eight years, making

it the "largest airborne refugee operation in American history." Masud-Piloto, at 68; Engstrom, at 29-30.

Instead of asking Congress for special legislation to admit arriving Cubans, the Administration continued to parole them into the country. Engstrom, at 30; Cong. Research Serv., at 190-91. On September 16, 1965, the Senate Judiciary Committee had reiterated the understanding that parole was meant for individual emergencies and not for "the immigration of classes or groups outside of the law." S. Rep. No. 89-748, at 17 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3335. But the Administration wanted to ensure that Congress did not limit the number of Cuban refugees allowed to enter or charge their admission against the immigration quotas for Latin America. Engstrom, at 30 & nn.110-13. Parole gave the Administration considerable discretion. In any event, in the first year of the airlift, Congress gave tacit consent to the use of parole for Cuban refugees when it passed the "Cuban Adjustment Act" of 1966, which enabled all Cubans "inspected and admitted or *paroled* into the United States subsequent to January 1, 1959" to apply for permanent residence after two years. Pub. L. No. 89-732, §1, 80 Stat. 1161 (1966) (emphasis added). It was clear that the parole of Cubans was meant to assist resettlement, not serve as temporary release from detention with eventual expiration of that release.

Indeed, like Presidents Eisenhower and Kennedy before him, President Johnson continued to appropriate more and more funds to the resettlement of Cuban refugees. Masud-Piloto, at 66. By the time President Johnson left office in January 1969, the airlift and resettlement programs were costing more than $100 million a year. *Id.* The flights continued for another four years under President Nixon, costing upwards of $120 million when they were unilaterally cancelled by the Cuban government on

April 6, 1973. *Id.* at 66-68; *Nixon Seeks Aid to Cubans*, N.Y. Times, Sept. 7, 1972, at 8.

Moreover, when Castro imposed restrictions on foreign travel without exit permits, the U.S. continued to welcome and parole those who fled Cuba in contravention of Cuban – as well as U.S. – law. Engstrom, at 48-50, 49 n.23, 52. Indeed, during this time the U.S. Government even paroled Cubans who forcibly hijacked vessels from Cuba, in violation of the 1973 Hijacking Treaty. Engstrom, at 48-52; Smith, at 200-02. After each incident, the Cuban government demanded that the U.S. abide by the treaty and prosecute the hijackers. Engstrom, at 48-52. Yet the U.S. paroled the hijackers into the country and refused to arrest or prosecute them, even though at least two of the hijackings involved real danger to the hostages aboard the vessels. Smith, at 200-03; Engstrom, at 48-52. The Cuban government contended that such inaction encouraged illegal departures, as did the unconditional welcome the U.S. gave to all Cubans who arrived by illegal means. Smith, at 201-02; Engstrom, at 52.

III. The Mariel Cubans Are Welcomed by President Carter, Paroled Into the United States as a Step Towards Resettlement, and Treated Like Prior Groups of Refugees.

Like the Cubans who came to the U.S. before them, those who came on the Mariel boatlift in 1980 were in many ways encouraged to come. Unlike President Johnson's actions in the earlier boatlift from Camarioca, President Carter actually enforced the laws against transporting undocumented aliens – after early non-enforcement – in an effort to stop the boatlift. But just as President Johnson had done with Camarioca, President Carter made a speech welcoming the Cubans "with an open heart and open arms;" refused to interdict or return

arriving Cubans; tried to replace the boatlift with a continuing airlift akin to the Freedom Flights of the 1960s and 1970s; and paroled into the country all those who arrived and passed initial screening.

More significantly to this case, when the Government employed parole on behalf of the Mariel Cubans, it did so as a means toward resettlement in the United States. There was no presumption that parole would eventually expire and they would be detained. In fact, they were treated like the refugees who came before them. They were provided with special status; received significant educational and welfare benefits, among other types of resettlement assistance; and were allowed to apply for permanent resident status through the Cuban Adjustment Act and Immigration Reform and Control Act of 1986.

A. The Carter Administration Receives All Cubans Who Depart from the Port of Mariel.

The Mariel Boatlift was triggered by an incident at the Peruvian embassy in Havana. On April 1, 1980, after seven years without legal immigration between the U.S. and Cuba, several Cubans seeking asylum drove a bus through the gates of the Peruvian embassy. Jo Thomas, *Crowd at Havana Embassy Grows; 10,000 Reported Seeking Asylum*, N.Y. Times, Apr. 7, 1980, at A1. Although the Cubans were unarmed, Cuban policemen guarding the embassy opened fire, killing one of their own in the crossfire. *Id.* On April 4, the Cuban government pulled the guards from the embassy and told the public that anyone who could obtain a visa was free to leave the country through the Peruvian embassy. *Id.* Within a few days, over 10,000 Cubans had crowded into the embassy compound. *Id.* Castro immediately alleged that most of the 10,000 were "scum, criminals, lumpen, parasites, and antisocial elements." Smith, at 79.

President Carter responded on April 14, employing for the first time new immigration provisions for the resettlement of refugees, enacted one month earlier by the Refugee Act of 1980. Pub. L. No. 96-212, 94 Stat. 102 (1980). Recognizing that "special circumstances exist[ed]," the President determined that those in the embassy "who otherwise qualify may be considered refugees even though they are still within their country of nationality or habitual residence." Presidential Determination No. 80-16, 45 Fed. Reg. 28079 (Apr. 14, 1980). Further, declaring "that an unforeseen refugee situation exists" the President concluded that "grave humanitarian needs" and the "national interest" justified the admission of up to 3,500 of the refugees and the appropriation of up to $4.25 million "to aid in [their] resettlement." *Id.*

Two days later, on April 16, an airlift was commenced to transport the Cubans who had taken refuge in the Peruvian embassy to Costa Rica for processing. *Cuba Bars Refugee Flights to Costa Rican Staging Area*, N.Y. Times, Apr. 19, 1980, at 6. But the Cuban government abruptly suspended the airlift three days after it began, partly because of adverse international publicity, demanding that the Cubans "be flown directly to the countries where they are to settle and not to a staging area in Costa Rica." *Id.* The Cuban government announced that anyone who wanted to leave the country would now have to do so through the port of Mariel. Engstrom, at 62. On April 21, a number of Cuban-Americans who had sailed to Mariel on April 19 returned to the U.S. with 40 Cuban nationals. *Id.* The boatlift had begun.

In the first days of the boatlift, the U.S. Government appeared uncertain of how to respond. State Department officials warned that the boatlift was illegal, but then withdrew the formal announcement that had been prepared on the issue. *U.S. Officials Warn Against Unauthorized Refugee Trips*, Wash. Post, Apr. 23, 1980, at A21. And

INS District Director Ray Morris, the top immigration official in Miami, told boaters that no crime would be committed if the "regular immigration process" was followed. *Id.* According to Morris, his office was using "normal procedures" in dealing with the "refugees," and so long as "boat captains bringing in Cubans notified immigration officials on arrival," they would be violating no law – "unless, down the line, asylum were refused." *Id.* These announcements were understood as endorsements of the boatlift. Engstrom, at 66.

On April 23, the State Department finally issued an official statement regarding the boatlift, indicating that while it was "deeply sympathetic" with those engaged in the boatlift, it could not "condone this procedure." 80 Dep't State Bull. No. 2039, at 68 (June 1980) (Dep't Statement of Apr. 23, 1980). It instructed boat owners that fines up to $2,000 would be levied for each Cuban they carried, that their boats would be subject to seizure, and that they were subject to imprisonment. *Id.*; John M. Goshko, *State Dept. Seeks to Halt Sealift*, Wash. Post, Apr. 24, 1980, at A1.

Cuban-Americans, however, largely ignored the warnings; the next day the Coast Guard observed approximately 1,000 boats traveling toward Cuba. Engstrom, at 62, 67 (quoting Scheina, at 4). And, as with the Camarioca boatlift, the laws were not fully enforced. Of the first 93 vessels that returned from Mariel with undocumented Cubans during the first 10 days of the boatlift, only 3 were seized. Joseph B. Treaster, *U.S. Seizes 3 Boats With Refugees*, N.Y. Times, Apr. 29, 1980, at A1; Engstrom, at 82. Federal agents issued to each boat "notices of intent to fine" carrying penalties of $1,000 per person transported, but they arrested none of the boat captains. Engstrom, at 82; John M. Crewdson, *Attempt by U.S. to Bar Freighter Apparently Fails*, N.Y. Times, June 3, 1980, at B11.

More significantly, and like the steps taken by President Johnson during the Camarioca boatlift, the Carter Administration decided to push for an orderly and safe departure program and to assist the boatlift in the interim. On April 27, noting that the boatlift was "extraordinarily dangerous and unlawful," the Administration asked Cuban-Americans to refrain from going to Mariel, directed the U.S. Navy and Coast Guard to "render all possible assistance to those at sea," and called on Castro to agree to an "orderly, safe, and humane evacuation of refugees." 80 Dep't State Bull. No. 2039, at 68 (June 1980) (Vice President's Statement of Apr. 27, 1980). At a hearing before the House Judiciary Committee on April 30, Victor H. Palmieri, the State Department's Coordinator for Refugee Affairs, articulated the Administration's position not to interdict those on their way to the U.S.:

> [L]ike scores of first-asylum countries around the world today, we will be generous; we will be sensitive to the basic human desires that motivated [the Cubans'] flight; no boats will be turned away, and no one will be returned to a country where he or she might face persecution.

Charles R. Babcock & Margot Hornblower, *Navy Ships Will Monitor Cuban Boatlift*, Wash. Post, May 1, 1980, at A1. Further, in order to assist the increasing number of Cuban arrivals, the White House on May 2 directed additional resources to process daily flows of 2,500 to 3,000 arrivals, assured screening to remove those with criminal records, expanded the Coast Guard's capability to assist the flotilla, and appropriated money for "resettlement" of the refugees. 80 Dep't State Bull. No. 2039, at 69 (June 1980) (White House Statement of May 2, 1980).

On May 5, President Carter made a speech before the League of Women Voters in which he welcomed Cuban "refugees" to the United States. In response to a question about the increasing problems with illegal immigration,

the President made a number of comments encouraging the continued migration of the Cuban refugees:

> We, as a nation, have always had our arms open to receiving refugees in accordance with American law. . . . We are the most generous nation on Earth in receiving refugees, and I feel very deeply that this commitment should be maintained. . . .
>
> I have organized within the White House . . . a combined group of departments who are working on this special flow of Cuban refugees. In the last few days we have received more than 10,000 from Cuba. . . . [L]iterally tens of thousands of others will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law.
>
> . . . [W]e'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.

President Carter's Speech of May 5, 1980, *reprinted in Fernandez-Roque v. Smith*, 622 F. Supp. 887, 897 n.16. (N.D. Ga. 1985). These remarks were "broadly interpreted as government approval of the boatlift." *Id.* Solidifying the invitation to come to the U.S., the State Department reported that the Administration had discontinued the practice of imposing fines on those who transported Cubans. Steven R. Weisman, *President Says U.S. Offers "Open Arms" to Cuban Refugees; Warm Reception is Promised*, N.Y. Times, May 6, 1980, at A1.

B. The Carter Administration Renews Attempts to Stop the Boatlift and Replace it With a Safe and Orderly Airlift.

By May 14, over 1,000 vessels had returned from Mariel carrying some 40,000 Cubans, and over 1,000 boats were still anchored in Mariel Harbor with the capacity to carry tens of thousands more. Engstrom, at 111; Joseph B. Treaster, *Coast Guard Begins Seizing Vessels*, N.Y. Times, May 15, 1980, at A12. Hundreds of boats had required Coast Guard assistance, and at least seven people had died on the high seas. Engstrom, at 108 n.17; 80 Dep't State Bull. No. 2039, at 70 (June 1980) (President's Statement of May 14, 1980). And there were growing reports that Castro was expelling criminals and the mentally ill to the U.S. through the boatlift.[7] Engstrom, at 111-12. These factors led the Carter Administration to renew its efforts to stop the boatlift and replace it with an orderly and safe departure program.

On May 14, President Carter announced his intention to strengthen law enforcement efforts and replace the boatlift with a government-run airlift and sealift. The President introduced a "program to permit safe and

[7] The Mariel Cubans were screened and processed by INS and Customs officials upon arrival. Those suspected of being criminals or mentally ill were also screened by the FBI, the CIA, and the Department of Defense. Iver Peterson, *For 'Problem' Refugees, the Wait for Freedom Is Tedious*, N.Y. Times, May 21, 1980, at A24. The INS reports that of the 125,000 Mariel Cubans, about 23,000 had criminal records. *U.S. Won't 'Let Another Mariel Happen,'* U.S. News & World Rep., Jan. 16, 1984, at 30. "Of those, 21,000 were involved in very minor misdemeanors or, in many cases, political kinds of crimes that would not be crimes in the U.S." *Id.*; Charles Oliver, *Another Influx of Marielitos? Data Shows Cubans in 1980 Boatlift Assimilated*, Investor's Bus. Daily, Sept. 23, 1994, at A1. Some 1,800 Mariel Cubans were detained on arrival and refused parole. *Fernandez-Roque*, 622 F. Supp. at 895 n.11.

orderly passage from Cuba," intending "to end Cuba's inhumane actions and to bring safety and order to a process that continues to threaten lives." 80 Dep't State Bull. No. 2039, at 70 (June 1980) (President's Statement of May 14, 1980). According to a White House statement later that day, the Government was chartering two large ships ready to go to Cuba and would "welcome the Cuban refugees in a legal and orderly process." *Id.* at 71 (White House Statement of May 14, 1980).

The following day, as negotiations continued with the Cuban government, federal officials began to fine and seize the boats of those who transported undocumented Cubans. By May 30, they had seized over 700 boats, though by that time over 89,000 Cubans had already arrived in the United States. Nathaniel Sheppard Jr., *Fishing Craft Used to Aid Cubans Will Be Released by U.S. Officials*, N.Y. Times, May 31, 1980, at 6. Cubans continued to arrive, but the number of boats embarking to Cuba dropped significantly. Engstrom, at 111, 113.

C. The Government Paroles the Cuban Arrivals Into the Country as a Step Toward Permanent Residency.

As Cubans continued to arrive from Mariel, U.S. officials considered their immigration status. Technically, the Government had been allowing them into the country for 60 days under parole, but the publicly stated assumption of Government officials was that the Cubans were here to stay and that provisions would be made for permanent residency. Robert Pear, *Carter Orders Move to Expel Criminals Among the Refugees*, N.Y. Times, June 8, 1980, at A1 ("The Cubans have been allowed in temporarily for 60 days under the Attorney General's 'parole' power, while the Government tries to decide what their legal status should be. It is widely accepted among Federal

officials concerned with the problem that most of the Cubans will be allowed to stay here under one legal theory or another."). *See also* Robert Pear, *Carter and Congress to Discuss Status of Refugees*, N.Y. Times, June 4, 1980, at A18 ("Two assumptions shared by most officials supervising refugee resettlement are that virtually all the Cubans will stay in the United States and that the Federal Government will eventually subsidize generous benefits for them.").

The question of what status to grant Mariel Cubans, however, was complicated by a few factors. The Refugee Act of 1980, enacted on March 17, had created permanent provisions for admitting refugees. Among other things, the Act limited to 50,000 the number of refugees the President could accept without consulting Congress. Pub. L. No. 96-212, § 207, 94 Stat. 102, 103. It also prohibited the use of parole on behalf of refugees unless it was determined that "compelling reasons in the public interest with respect to that particular alien" required parole rather than admission as a refugee. *Id.* at § 203(f)(3)(B), 94 Stat. at 108. Further, thousands of Haitians had migrated to the U.S. during the last decade, and President Carter was faced with strong criticism for what was perceived to be preferential treatment for Cubans. Engstrom, at 108 & n.22, 144-45 & n.43; *Double Standard for Cuban, Haitian Refugees?*, U.S. News & World Rep., May 5, 1980, at 42. To avoid this criticism, he decided that any decision on the status of Cuban arrivals would apply equally to Haitians. Engstrom, at 85 n.148, 139, 145-46.

For the first few weeks of the boatlift, the Administration had referred to the Mariel Cubans as refugees and considered dealing with them under the new provision for refugee admissions – section 207 of the INA – just as it

had done for those who took refuge at the Peruvian embassy.[8] Engstrom, at 148-54. But because section 207 allowed the President only 50,000 admissions, he would have been forced to consult with Congress and present detailed studies regarding the social, economic, and demographic impact of resettlement. Pub. L. No. 96-212, §§ 207(b) & (e), 94 Stat. 102, 103-04. This raised concerns that the Cubans would be counted against the refugee quotas, which would limit the number of Cubans allowed to stay and adversely affect potential refugees from other countries. Robert Pear, *President to Treat Cubans as Applicants for Asylum*, N.Y. Times, May 21, 1980, at A24.

Also, for years the U.S. had labeled arriving Haitians as economic migrants and refused to consider them refugees. Engstrom, at 145, 148; Robert Pear, *President to Treat Cubans as Applicants for Asylum*, N.Y. Times, May 21, 1980, at A24. Thus, while classifying the Cubans as refugees meant merely continuing an established tradition, to do the same for Haitians meant an abrupt break with policy. Engstrom, at 145, 152-53. And because the U.S. had generally considered Haitians not to have credible claims of persecution, giving them refugee status would have gutted the Refugee Act of its political persecution test and created dangerous precedent. Engstrom, at 145, 147-48, 153-54. Doris Meissner, Deputy Assistant

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[8] The Refugee Act of 1980 for the first time defined the term "refugee" for use in the INA. Pub L. No. 96-212, § 201(a), 94 Stat. 102 (codified at 8 U.S.C. § 1101(a)(42)). It was defined, as it had been used earlier, to mean a person outside her country of nationality or last habitual residence who is unable to return "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* The new definition also allowed the President to designate persons still within their country of nationality as refugees after consulting with Congress. *Id.*

Attorney General at the time, later explained that the policy of equal treatment for Cubans and Haitians prevented the Administration from classifying Cubans as refugees under the Act:

> If this had just been Cubans, I don't think there would have been much question that we would have done what we had always done and that is designate them as refugees. But I don't think we would have much question in our minds and I'd be very surprised if we even would have really debated their status. We would have certainly found a way under the Refugee Act either under section 207 or 208, and I think it could have gone either way, to designate them as refugees. But it is the Haitians that created the turf test.

Engstrom, at 147 (interview of Oct. 20, 1989).

To circumvent these issues, the Administration on May 20 initially decided to classify the Mariel Cubans as applicants for asylum, not as refugees, "thus giving the President greater discretionary authority as to how many would be admitted to live in the United States." Robert Pear, *President to Treat Cubans as Applicants for Asylum*, N.Y. Times, May 21, 1980, at A24. Administration officials specifically noted that because they were not classified as refugees, "there was no need to consult with Congress to set the number ultimately admitted." *Id.* The Administration had "created a separate category for them with no numerical limit." *Id.*

Considering them as asylum applicants, however, was no long-term solution. It would have taken the Administration years, if not decades, to process 125,000 asylum applications on a case-by-case basis. *Id.*; Engstrom, at 155. Because asylum grants were also based on the refugee provision's persecution test, Cubans were much more likely than Haitians to obtain asylum, thereby resulting in the disparity the Administration wanted to avoid. Engstrom, at

155. And until their asylum applications were ruled on, they would not qualify for any federal benefits. *Id.*

Thus, on June 20, the Carter Administration issued a policy statement reclassifying Cubans who had arrived between April 21 and June 19, as well as Haitians in INS proceedings as of June 19, as "Cuban/Haitian Entrants (status pending)." *Text of State Dept. Statement on a Refugee Policy*, N.Y. Times, June 21, 1980, at 8. According to the statement, the Administration would submit legislation to Congress "as soon as possible" to "[e]stablish a 'Cuban-Haitian Entrant' status for recently arrived Cubans and Haitians;" provide federal benefits and emergency assistance to the entrants; and "provide for conversion to permanent resident status after two years." *Id.* The Administration extended its use of parole "to give Congress time to enact [the] special legislation." Robert Pear, *U.S. to Let Refugees from Cuba and Haiti Remain for 6 Months*, N.Y. Times, June 21, 1980, at 1. That same day, in a State Department press briefing, Coordinator for Refugee Affairs Victor Palmieri added, "These people for the most part are here to stay. I believe this Congress will regularize their status in due time." *Id.*

D. The Government Takes Measures to Facilitate the Permanent Resettlement of the Mariel Cubans, Like That of Earlier Groups of Refugees.

On September 28, 1980, the Cuban Government closed the Port of Mariel and unilaterally ended the boatlift. Steven R. Weisman, *Havana Government Unilaterally Cuts Off Refugee Boat Exodus*, N.Y. Times, Sept. 27, 1980, at A1. Negotiations to replace the Mariel boatlift with a U.S.-run airlift continued into January of 1981, but the Cuban government decided to wait until after the inauguration of President Reagan to finish the accord.

Engstrom, at 184. The Reagan Administration, however, did not resume talks with the Cuban government, and the agreement stalled. *Id.*

Meanwhile, the Cubans who arrived and were paroled into the country, although provided with entrant classification, were in many ways treated like refugees. For example, to facilitate resettlement President Carter appropriated over $31 million in funds from the U.S. Emergency Refugee and Migration Assistance Fund on September 21 "for the purposes of processing, transporting, caring, and resettling" Cubans and Haitians. Pres. Determination No. 80-27, 45 Fed. Reg. 65,993 (Sept. 21, 1980). He also made the Cubans and Haitians in parole status prior to June 19 eligible for Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), and Medicaid. *Text of State Dept. Statement on a Refugee Policy*, N.Y. Times, June 21, 1980, at 8; Engstrom, at 162. In addition, like designated refugees, both Cubans and Haitians were granted work authorization. Engstrom, at 140-141.

On October 10, Congress enacted the Refugee Education Assistance Act of 1980 (REAA), which explicitly granted the services and benefits available to refugees under the Refugee Act "in the same manner and to the same extent" to Cuban and Haitian entrants. Pub. L. No. 96-422, § 501(b), 94 Stat. 1799, 1809 (1980). Congress also authorized $100 million in resettlement aid and provided for three years of funding to state educational agencies to assist in the education of the refugees' children. *Id.* at §§ 201-501, 94 Stat. at 1801-10. In the House debate on the Act, both supporters and opponents of the legislation assumed the entrants would remain in the U.S. permanently. Congressman Danielson stated that although their status had not yet "been fixed as a matter of law," the entrants were "the guests of the United States and therefore the United States should pay for the cost of assimilating

them and not the local taxpayers." 126 Cong. Rec. H28471 (daily ed. Sept. 30, 1980). Congressman Pepper added: "These children presumably are going to be with us the rest of their lives. They are a part of America." *Id.*

Further, within a few years, the Cuban parolees – though not the Haitian parolees – were adjusting to permanent resident status. Because the Cuban Adjustment Act specifically addressed Cubans "paroled" into the country, Mariel Cubans were eligible to apply for adjustment of status after one year's residence.[9] The INS accepted applications under the Act but did not process them pending enactment of special legislation that had been introduced in Congress. Robert Pear, *Cuban Aliens, But Not Haitians, Will Be Offered Residency Status*, N.Y. Times, Feb. 12, 1984, at A1. When the legislation stalled, the Reagan Administration authorized the INS to resume the processing of the applications. *Id.*; Registration of Mariel Cubans, 49 Fed. Reg. 46,212 (Nov. 23, 1984). By the end of 1987 some 84,000 Mariel Cubans had become permanent residents. Engstrom, at 187.

With passage of the Immigration Reform and Control Act of 1986 (IRCA), Congress provided all Cuban-Haitian Entrants the legal means to adjust their immigration status outside the INA's numerical limitations. Pub. L. No. 99-603, § 202, 100 Stat. 3359, 3404 (1986). The House Committee Report on IRCA noted that both the House and Senate:

> recogniz[ed] the inappropriateness of continuing parole for a group of people who are permanently residing in the United States under color of law

[9] The Refugee Act of 1980 had amended the Cuban Adjustment Act's residency requirement from two years to one. Pub. L. No. 96-212 at § 203(i), 94 Stat. at 108.

> and realiz[ed] that the interests of the United States would best be served if Cuban-Haitian Entrants were allowed to apply for lawful permanent residency in the United States[.]

H.R. Rep. No. 99-682(I), at 75 (1986). Agreeing that IRCA was "intended to remedy well documented wrongs and inequities, and to fulfill specific promises of two successive administrations," the Committee members concluded by stating their belief "that it is time Cuban/Haitian Entrants are granted a status that is consistent with the reality of their permanent residency in the United States." *Id.* at 76. Just as parole had been used to admit and resettle Cubans and other refugees, parole was used as a legal mechanism to allow Mariel Cubans entry into the United States and provide a first step towards permanent resettlement.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court below.

Respectfully submitted,

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APPENDIX A

The Florida Immigrant Advocacy Center (FIAC) is a nonprofit legal services organization dedicated to promoting the basic human rights of immigrants and refugees of all nationalities. FIAC's attorneys have represented thousands of immigrants and refugees, including Mariel Cubans, many of whom have been indefinitely detained. FIAC is thus extremely concerned with the issue of indefinite detention, especially as it relates to Mariel Cubans and other refugees and displaced persons who entered the United States on parole. FIAC submits this brief to make the Court aware of the historical use of parole on behalf of refugees and the history of Cuban emigration to the United States both before and during the Mariel boatlift.

Rafael Peñalver is a Cuban-American attorney and community activist in Miami, Florida. He has served as Chairman of the State of Florida Commission on Hispanic Affairs and is the current President of the San Carlos Institute, a Cuban cultural and education center, founded in 1871 by Cuban exiles and dedicated to the preservation and promotion of Cuban traditions, values and democratic ideals. For the last twenty years, Mr. Peñalver has been deeply committed to fighting the indefinite detention of noncitizens by the federal government, especially the indefinite detention of Mariel Cubans. He has testified in both the Senate and the House of Representatives on the issue of indefinite detention, and he received a special commendation in 1988 from the Florida Supreme Court for his pro bono work on behalf of Mariel Cuban detainees.

(3)

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DANIEL BENITEZ,

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JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

~~MOTION FOR LEAVE TO FILE AND BRIEF~~ *AMICI CURIAE* OF REGINA GERMAIN AND IRA KURZBAN IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF REGINA GERMAIN AND IRA KURZBAN IN SUPPORT OF PETITIONER

Amici respectfully move this Court for leave to file the attached brief amici curiae in support of petitioner. Amici requested consent to file this brief from counsel for all parties on February 23, 2004. Amici received consent from petitioner. Counsel for respondent had not responded to the request for consent as of the time this brief was being printed.

Amici are academics who teach and write about immigration law. They specialize in immigration law and have followed immigration issues throughout their careers. They have written extensively on topics pertaining to immigration and asylum law. They have knowledge of the effect of the Eleventh Circuit decisions upon excludable aliens subject to post-removal detention.

Professor Regina Germain is a visiting professor at the University of Denver College of Law in the Civil Clinic. Previously, she taught as a Fellow at Georgetown University Law Center. From 1995 through 2001, she served as Senior Legal Counselor in the Washington Office of the United Nations High Commissioner for Refugees. In this capacity, she monitored United States compliance with international obligations relating to the treatment of refugees, including site visits to detention centers and immigration courts. Additionally, she made presentations at immigration law conferences and drafted comments on legislation and INS policies impacting refugees. She is the author of AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure.

Mr. Ira Kurzban is the author of *Kurzban's Immigration Law Sourcebook,* the most widely used one-volume immigration source in the United States. He is an adjunct faculty member at two law schools, and has lectured and published extensively in the field of immigration law, including articles in the Harvard Law Review. In addition, Mr. Kurzban is a partner in the law firm of Kurzban, Kurzban, Weinger & Tetzeli, P.A.

Amici have no financial or other similar interest in the outcome of this lawsuit or any suits raising similar issues. Their sole interest in this case is to encourage the proper unfolding of law in their areas of specialty.

From their academic and professional backgrounds, amici are aware of consequences upon immigration law if the could government may detain indefinitely excludable aliens because no foreign country will accept the alien. Such detention is not related to the government's goal in regulation, which is to effectuate the removal order. Without another purpose of the confinement, the government's ongoing civil detention of aliens becomes punishment. Additionally, the amici have observed lower courts and the government rely upon vague and attenuated national security concerns in justifying civil detention. The Eleventh Circuit discussed national and border security concerns in upholding indefinite detention, even though there is no finding in the record that Mr. Benitez presents a threat to national security. Under this reasoning, any excludable alien could be subject to indefinite detention based upon unsubstantiated references to national security. This would be detrimental to the development of immigration law.

Because the government's regulatory purpose is thwarted when removal cannot be effectuated, indefinite detention is not permissible without a judicial proceeding. Yet the government is detaining indefinitely excludable aliens who cannot be removed to another country. This ongoing detention is based solely upon an administrative determination that the aliens might be criminal recidivists. It is not subject to judicial review. The only judicial oversight occurs during habeas proceedings. Excludable aliens who are being indefinitely detained have limited access to the judicial system. Hence, the amici have an interest in articulating the effects upon excludable aliens from the Eleventh Circuit's decision.

For the foregoing reasons, amici respectfully request leave to file the accompanying brief amici curiae in support of petitioners.

Respectfully submitted,

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February 25, 2004

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. NATIONAL SECURITY IS NOT THREATENED BY THE RELEASE OF INADMISSIBLE ALIENS WHO CANNOT BE REMOVED TO THEIR HOME COUNTRY 3

A. THE AGENCY'S REGULATORY INTERESTS CAN BE SUFFICIENTLY ADDRESSED THROUGH SUPERVISED RELEASE 4

1. *Zadvydas* Applies To A Small Group Of Aliens 4

2. Supervised Release Is Not Release At Large 6

3. An Alien Cannot Thwart His Removal Through *Zadvydas* 7

B. THE GOVERNMENT HAS NOT EXPLAINED WHY OTHER STATUTES ARE INSUFFICIENT TO ADDRESS NATIONAL SECURITY CONCERNS 7

1. Detention Authority Before September 11, 2001 7

2. Detention After September 11, 2001 .. 8

3. Detention of Admitted Aliens After *Zadvydas* 12

TABLE OF CONTENTS—Continued

II. THE ELEVENTH CIRCUIT ERRED IN RELYING EXCLUSIVELY UPON BORDER AND NATIONAL SECURITY CONCERNS TO JUSTIFY INDEFINITE DETENTION 13

A. MARIEL CUBANS, SUCH AS MR. BENITEZ, ARE NOT A THREAT TO NATIONAL SECURITY 13

B. UNSUBSTANTIATED BORDER SECURITY CONCERNS CANNOT JUSTIFY INDEFINITE DETENTION 15

C. *MEZEI* AND *CARLSON* DO NOT JUSTIFY INDEFINITE DETENTION HERE 17

III. EXCLUDABLE ALIENS ARE BEING INDEFINITELY DETAINED WITH NO SIGNIFICANT POSSIBILITY OF REMOVAL 20

A. POST-ORDER DETENTION ON CRIMINAL RECIDIVISM GROUNDS VIOLATES *ZADVYDAS* 20

B. ADOPTION OF THE INS'S READING WOULD HAVE BROAD RAMIFICATIONS 22

C. PROLONGED DETENTION IS WARRANTED ONLY BY SPECIAL CIRCUMSTANCES, WHICH ARE NOT PRESENT HERE 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page

Ali v. Aschcroft, 213 F.R.D. 390 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873 (9th Cir. 2003) 4

Armentero v. INS, 340 F.3d 1058 (9th Cir. 2003) 26

Balogun v. INS, 9 F.3d 347 (5th Cir. 1993) 7

Bay Area Peace Navy v. United States, 914 F.2d 1224 (9th Cir. 1990) 16

Bell v. Wolfish, 441 U.S. 520 (1979) 26

Bezman v. Ashcroft, 245 F. Supp. 2d 446 (D. Conn. 2003) 19

Bini v. Aljets, 36 Fed. Appx. 868, 869 (8th Cir. 2002) 22

Borrero v. Aljets, 325 F.3d 1003 (8th Cir. 2003) 22

Caranica v. Nagle, 28 F.2d 955 (9th Cir. 1928) 5

Carlson v. Landon, 342 U.S. 524 (1952) 17, 18, 27

Chi Thon Ngo v. INS, 192 F.3d 390 (3d Cir. 1999) 4, 25

Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) 16

Elkins v. Comfort, 245 F. Supp. 2d 1161 (D. Colo. 2003) 23

Foucha v. Louisiana, 504 U.S. 71 (1992) 27

Gonzalez v. Ashcroft, 278 F. Supp. 2d 402 (D.N.J. 2003) 24

Jones v. United States, 463 U.S. 354 (1983) 27

Kansas v. Crane, 534 U.S. 407 (2002) 28

Kansas v. Hendricks, 521 U.S. 346 (1997) 27

Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987) 25

N.Y. Times Co. v. United States, 403 U.S. 713 (1971) 15

North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) 16

O'Rourke v. Warden, 539 F. Supp. 1131 (S.D.N.Y. 1982) 5

Pelich v. INS, 329 F.3d 1057 (9th Cir. 2003) 7

People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238 (D.C. Cir. 2003) 16

Petition of Brooks, 5 F.2d 238 (D. Mass. 1925) 25

Plyler v. Doe, 457 U.S. 202 (1982) 24

Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) 18, 28

Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003) (en banc) 18

Schall v. Martin, 467 U.S. 253 (1984) 27

Seretse-Khama v. Ashcroft, Civ. No. 02-0955, 2002 U.S. Dist. LEXIS 13547 (D.D.C. July 22, 2002) 24

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 17, 18

United States ex rel. Janavaris v. Nicolls, 47 F. Supp. 201 (D. Mass. 1942) 4

United States ex rel. Ross v. Wallis, 279 F. 401 (2d Cir. 1922) 5, 25

United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998), *limited on other grounds, United States v. Lazcano-Villalobos*, 175 F.3d 838 (10th Cir 1999). 16

United States v. Salerno, 481 U.S. 739 (1987) 23, 28, 29

United States v. Witkovich, 140 F. Supp. 815 (N.D. Ill. 1956), *aff'd*, 353 U.S. 194 (1957) 19

Wong Wing v. United States, 163 U.S. 228 (1896) 25, 26

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 25

Zadvydas v. Davis, 533 U.S. 678 (2001) ..... 3, *passim*

STATUTES

8 U.S.C. § 1226(a) 8

8 U.S.C. § 1226(c) 8, 11, 22

8 U.S.C. § 1231(a)(3) 6

8 U.S.C. § 1231(a)(6) ..... 2, *passim*

8 U.S.C. § 1537(b) 11

50 U.S.C. § 21 8

Alien Registration Act of 1940, 54 Stat. 671-672 (June 28, 1940) 8

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) 8

Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001) 6, 12

Enemy Alien Acts of 1798, 1 Stat. 577 8

Immigration Act of 1917, 39 Stat. 874, 889 8

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001) 10, 11

LEGISLATIVE MATERIALS

S. Rep. No. 1515, at 637, 639 (1950) 18

Civil Liberties and Proposed Anti-Terrorism Legislation: Hearings Before the Subcomm. On the Constitution, Federalism, and Property Rights of the Senate Comm. On the Judiciary, 107th Cong. 6 (2001) (statement of Prof. David Cole), available at 2001 WL 1171720 10

DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. On the Judiciary, 107th Cong. (Dec. 6, 2001) (testimony of Ali-Al-Maqtari) 9

REGULATORY MATERIALS

8 C.F.R. § 212.12 (2003) 23

8 C.F.R. §§ 241.12-.13 (2003) 12

8 C.F.R. § 241.4 (2003) 23

65 Fed. Reg. at 80,297 (Dec. 21, 2000) 11

Custody Procedures, 66 Fed. Reg. 48,334, 48,334 (Sept. 20, 2001) 9, 10, 11

United States General Accounting Office, *Homeland Security: Challenges to Implementing the Immigration Interior Enforcement Strategy* 14

ADMINISTRATIVE DECISIONS

In re D-J, 23 I. & N. Dec. 572 (BIA 2003) 12

In re Patel, 15 I & N. dec. 666 (BIA 1976) 5

ARTICLES

Administrative Comment, Indefinite Detention without Probable Cause: A Comment on the INS Interim Rule 8 C.F.R. 287.3, 26 N.Y.U. Rev. L. & Soc. Change 397 (2000-01) 9

79 *Interpreter Releases* 811 (May 24, 2002) 4

David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003, 1014 (2002) 28

Developments in the Law: The Law of Prisons: V. Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens, 115 Harv. L. Rev. 1915, 1938 (2002) 9

Human Rights Watch, World Report *2002: Events of 2001, November 2000-November 2001*, at 487-88 (2002) 9

Richard Lewis, *Cambodians Decry Deportation During Providence March*, Associated Press Newswires, Aug. 5, 2002 6

Robyn E. Blumner, *Ashcroft's Power to Detain Without Charges Continues without Oversight*, St. Petersberg Times, May 5, 2002, at D6 ..... 9, 11

Elizabeth Amon, *INS Flouts High Court on Prisoners, Critics Say*, Nat'l L.J., Aug. 15, 2002, http://www.law.com/jsp/article.jsp?id=1028906395219 24

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is set forth in the accompanying motion for leave to file this brief.[1]

STATEMENT OF THE CASE

In 1980, an estimated 125,000 Cubans came to the United States from Port Mariel subject to the invitation by President Carter. *See Benitez v. Wallis*, 337 F.3d 1289, 1290 n.1 (11th Cir. 2003) (per curiam). The Immigration and Naturalization Service ("INS") paroled Mr. Benitez into the United States.[2] As one of the Mariel Cubans, he physically entered the United States in 1980. *Id.* at 1290. Mr. Benitez was never admitted to the United States; he is an excludable alien. While in the United States, Mr. Benitez was convicted of crimes on two occasions. *Id.* at 1290-91. He completed his criminal sentence before INS took him into civil custody in a federal prison. *See id.* at 1291. Upon serving his criminal sentence, INS detained Mr. Benitez and entered an order for his removal to Cuba. *Id.* An alien cannot be removed from the United States unless a foreign county issues travel documents. Under Fidel Castro's reign, however, Cuba has refused to accept the Mariel Cubans generally and has rejected Mr. Benitez in particular. Thus, since 2001, Mr. Benitez has remained in detention, with no significant possibility of removal.

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[1] The brief was not authored in whole or in part by counsel for a party to this proceeding, and no person or entity other than the amici curiae made a monetary contribution for preparation of this brief.

[2] For convenience, amici refer to the INS under its former name even though the agency's functions were recently transferred to the Department of Homeland Security.

The Eleventh Circuit found this detention to be indefinite. "[W]e accept Mr. Benitez's claim that he, at present, is subject to indefinite detention." *Id.* at 1293 n.12. There was no finding that Mr. Benitez presented a threat to national security or was a suspected terrorist. The Eleventh Circuit upheld Mr. Benitez's indefinite detention under Section 1231(a)(6).

SUMMARY OF ARGUMENT

The Eleventh Circuit erred in upholding indefinite detention for inadmissible aliens when there is no significant possibility of effectuating his removal to Cuba. The court relied upon attenuated national and border security concerns in upholding indefinite detention. Such concerns do not justify indefinite detention of inadmissible aliens under Section 1231(a)(6), for several reasons.

First, the INS's regulatory interests are protected because release of post-order aliens is subject to supervision. Furthermore, release does not alter an alien's status, and the government may re-detain an alien once a foreign country agrees to accept him because the purpose of the detention would be to effectuate the removal order. To the extent there are broader border interests at stake, the government has not explained why those interests are not protected under other statutes.

Second, the Eleventh Circuit cited national and border security concerns as a reason to grant the government the authority to detain indefinitely excludable aliens under Section 1231(a)(6). Yet, even though the government has not argued that national security concerns were present in this case, the Eleventh Circuit upheld Mr. Benitez's indefinite detention. Under this reasoning, any excludable alien would be subject to indefinite detention, whether or not there is a finding that he threatened to national security. This result conflicts with precedents that granted greater deference

to administrative determinations concerning prolonged detention only when national security concerns were present.

Third, indefinite detention of excludable aliens, such as Mr. Benitez, violates *Zadvydas v. Davis*, 533 U.S. 678 (2001), as long as the government cannot effectuate his removal order. Such detention is neither for a limited time period, nor based upon a judicial finding of special circumstances. Like the aliens in *Zadvydas*, civil detention is indefinite and based solely upon an administrative determination of potential criminal recidivism. The Eleventh Circuit erred in distinguishing *Zadvydas*, which is binding precedent for statutory interpretation of authority to detain excludable aliens under Section 1231(a)(6).

ARGUMENT

I. National Security Is Not Threatened By The Release Of Inadmissible Aliens Who Cannot Be Removed To Their Home Country

The government's statutory argument is based largely on a policy justification, rather than the statute. It argues that the detention of inadmissible aliens is justified on national security grounds. However, *Zadvydas* only applies to a small group of aliens, and the INS can address its genuine regulatory interests through supervised release. To the extent there are any larger national security concerns, the government has not explained why its authority under other statutes would be insufficient to address those concerns. Applying *Zadvydas* to excludable aliens will not leave an "unprotected spot in the Nation's armor." *Zadvydas*, 533 U.S. at 695-96 (internal quotations and citation omitted).

A. The Agency's Regulatory Interests Can Be Sufficiently Addressed Through Supervised Release

1. *Zadvydas* Applies To A Small Group Of Aliens

Section 1231(a)(6) and *Zadvydas* only apply to a narrow category of inadmissible aliens: those who have no significant likelihood of removal to a foreign country. For instance, a few countries, including Cuba and Vietnam, do not have a repatriation agreement with the United States. *E.g., Zadvydas v. Davis*, 533 U.S. at 686 (observing that Ma cannot be removed because the United States does not have a repatriation agreement with Cambodia). Of the detainees who cannot be removed, most are citizens of Laos, Cuba, and Vietnam. 79 *Interpreter Releases* 811 (May 24, 2002). In addition to Benitez, more than 1,750 Mariel Cubans are detained in prison facilities; they are not deportable because Cuba will not accept them. *See Chi Thon Ngo v. INS*, 192 F.3d 390, 395 (3d Cir. 1999). As another example, some excludable aliens are stateless individuals--they claim citizenship of no country. *E.g., Zadvydas*, 533 U.S. at 684 (2001). Some countries do not have an effective government which can accept removal authority. *Ali v. Aschcroft*, 213 F.R.D. 390 (W.D. Wash. 2003) (removal to Somalia in the reasonably foreseeable future is not likely), *aff'd*, 346 F.3d 873 (9th Cir. 2003).

When a foreign country agrees to accept the excludable alien, then the executive branch has authority to re-detain the alien. Because removal is now possible, the detention is limited in duration and for the purpose of effectuating the removal order. Because diplomatic relations are continually evolving, release under *Zadvydas* is not release at large. *E.g., United States ex rel. Janavaris v. Nicolls*, 47 F. Supp. 201, 203 (D. Mass. 1942) (threatening to grant habeas petition of Greek cabin boy insofar as the government could not ensure

the deportation to Greece when the "matter depends on future successful military campaigns"). When removal became reasonably likely the government could then detain the inadmissible alien in order to effectuate the removal order under Section 1231(a)(6).

Historically, the courts have placed limits upon post-deportation detention of aliens, and United States sovereignty has not suffered as a result. *Zadvydas*, 533 U.S. at 697-98 (recognizing that lower courts interpreted statutory silence of the Immigration Act of 1917 to limit detention to a reasonable period). Lower courts have construed the provision of the Immigration Act of 1917, 39 Stat. 874, ch. 29, that aliens were to be "taken into custody and deported," holding that detention was allowed only for a reasonable period of time. *E.g., Caranica v. Nagle*, 28 F.2d 955, 957 (9th Cir. 1928) (observing that the courts will "discharge the appellant from further imprisonment if the government fails to execute the order of deportation within a reasonable time"); *United States ex rel. Ross v. Wallis*, 279 F. 401, 403 (2d Cir. 1922) (limiting detention to a reasonable period).

The political branches concurred in the historical interpretation by the courts. Detention during deportation proceedings should be reserved only for those aliens who posed a threat to national security. *In re Patel*, 15 I & N. Dec. 666, 666 (BIA 1976) (interpreting 8 U.S.C. § 1252(a) to require release of the alien unless "he is a threat to the national security"); *see also O'Rourke v. Warden*, 539 F. Supp. 1131, 1135 (S.D.N.Y. 1982) (describing BIA interpretation that an "alien should be detained or required to post a bond, only if he is a threat to national security"). *Zadvydas* continues this historical trend in limiting post-removal detention to a reasonable time period. Thus, the Court did not impede the political branches' sovereignty in *Zadvydas* though its interpretation of Section 1231(a)(6).

2. Supervised Release Is Not Release At Large

Instead of being indefinitely detained, inadmissible aliens who cannot be removed are subject to supervised release. This is not release at large, and it does not change an alien's immigration status. *Zadvydas*, 533 U.S. at 696. "Supervised release" is subject to tight restrictions, including compliance with the law, continued efforts to obtain travel documents, participation in rehabilitative programs, or submission to medical exams. 8 U.S.C. § 1231(a)(3) (2000); *see also Zadvydas*, 533 U.S. at 699; 66 Fed. Reg. 56,967, 56,978-79 (Nov. 14, 2001) (codified at 8 C.F.R. 241.13(h)). The government has imposed, and courts have upheld, tight restrictions upon release from post-removal detention. Furthermore, an alien would be subject to criminal sanctions if he violated the conditions attached to his parole. *Zadvydas*, 533 U.S. at 700. If they violate the conditions of their supervised release, aliens can even be re-detained.

Release does not change an alien's status; the alien remains subject to a removal order. For example, Mr. Benitez is an excludable alien subject to removal (as soon as Cuba or another country accepts him). Once the State Department obtains travel documents from a foreign country, then it may re-detain the alien pending removal. For example, the United States negotiated an agreement with Cambodia in 2002 to accept the return of deportees. After negotiating the agreement, the INS re-detained many of the Cambodians released under *Zadvydas*.[3] When there is no significant possibility of executing a removal order,

[3] *See* Richard Lewis, *Cambodians Decry Deportation During Providence March*, Associated Press Newswires, Aug. 5, 2002.

supervised release presents a non-punitive alternative to indefinite detention. Such release is subject to tight restrictions, and does not transform the alien's immigration status: if Mr. Benitez were subject to supervised released, he would remain an excludable alien subject to a removal order.

3. An Alien Cannot Thwart His Removal Through *Zadvydas*

The six-month presumption from *Zadvydas* does not apply if the alien has thwarted his own removal. Before *Zadvydas*, courts tolled the limit on the detention period when the alien intentionally prevented the INS from effecting the deportation. *Balogun v. INS*, 9 F.3d 347, 351 (5th Cir. 1993). After *Zadvydas*, courts have continued to follow this line of cases. *Pelich v. INS*, 329 F.3d 1057, 1060 (9th Cir. 2003) (upholding indefinite detention because alien failed to meet burden under *Zadvydas* when the alien refused to cooperate with the INS in the removal process).

B. The Government Has Not Explained Why Other Statutes Are Insufficient To Address National Security Concerns

As the preceding section demonstrates, the INS's regulatory interests with respect to post-order aliens can be sufficiently protected through supervised release. To the extent the INS justifies its reading of Section 1231(a)(6) on larger national security concerns, it has not explained why such concerns are not protected through more specific statutes enacted for that purpose.

1. Detention Authority Before September 11, 2001

The political branches have had authority to detain aliens who presented threats to national security. Section 1231(a)(6) grants authority to the executive branch to detain all aliens subject to removal, including those who are

suspected of terrorism. Historically, Congress has authorized additional detention provisions that are specifically tailored to protect national security. These specific provisions are in addition to general detention provision of Section 1231(a)(6). For example, Congress authorized detention of aliens who were suspected terrorists. 8 U.S.C. §§ 1226(a), (c); *see* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of the U.S.C.). Such authority was also granted to detain alien enemies. *E.g.*, Enemy Alien Acts of 1798, 1 Stat. 577, derived from act of July 6, 1798 (codified as 50 U.S.C. § 21); 2 Stat. 781, act of July 6, 1812; Alien Registration Act of 1940, 54 Stat. 671-672 (June 28, 1940) (deportation of subversives). These immigration provisions were separate from the detention and removal provision that applied to all aliens subject to deportation. *E.g.*, Immigration Act of 1917, 39 Stat. 874, 889 (providing general detention provisions for aliens subject to deportation); 8 U.S.C. § 1231(a)(6). Thus, the political branches have had separate authority to detain aliens who pose threats to national security.

2. Detention After September 11, 2001

After September 11, 2001, the political branches enacted additional specific statutes and administrative regulations to protect national security. These provisions authorized detention of aliens suspected of terrorism, and they did not amend Section 1231(a)(6), which applies generally to aliens subject to removal. Hence, in fighting the war on terror, the government has detained or arrested aliens suspected of terrorism or terrorist affiliations for questioning under criminal laws or statutes other than § 1231(a)(6).

For example, immediately after September 11, 2001, the federal government detained hundreds of aliens residing within the United States, holding many on criminal charges

unrelated to terrorist activity, including credit card fraud or minor immigration violations.[4]

Most of these detentions occurred pursuant to an interim regulation issued by the Attorney General after September 11, 2001, which allowed detention without charge of aliens for forty-eight hours. These regulations authorized further detention for an "additional reasonable period of time" under "emergency or other extraordinary circumstances." Custody Procedures, 66 Fed. Reg. 48,334, 48,334 (Sept. 20, 2001) (to be to be codified at 8 C.F.R. § 287.3(d)). The regulation does not define "emergency or other extraordinary" circumstances, and the detention can be unrelated to such circumstances. *Administrative Comment, Indefinite Detention Without Probable Cause: A Comment on the INS Interim Rule 8 C.F.R. 287.3*, 26 N.Y.U. Rev. L. & Soc. Change 397 (2000-01). Notably, the PATRIOT Act does not displace these interim regulations. Under these regulations, the executive branch may indefinitely detain an alien without certifying that the alien is a suspected terrorist. Custody Procedures, 66 Fed. Reg. 48,334, 48,334-35 (Sept. 20, 2001) (to be to be codified at 8 C.F.R. § 287.3(d)); *see also Developments in the Law: The Law of Prisons: V. Plight of*

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[4] Human Rights Watch, *World Report 2002: Events of 2001, November 2000-November 2001*, at 487-88 (2002), *available at* http://www.hrw.org /wr2k2/pdf/usa.pdf; *see also* DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary, 107th Cong. (Dec. 6, 2001) (testimony of Ali-Al-Maqtari, a French teacher from Yemen who was arrested on September 15th and detained for eight weeks), *at* http://www.aia.org/newsroom/23ts1001.html; Robyn E. Blumner, *Ashcroft's Power to Detain Without Charges Continues without Oversight*, St. Petersberg Times, May 5, 2002, at D6 (noting that 104 immigrants remained detained).

the Tempest-Tost: Indefinite Detention of Deportable Aliens, 115 Harv. L. Rev. 1915, 1938 (2002) ("[T]he interim regulation allows the INS to detain indefinitely aliens not certified as terrorists, if it determines that emergency circumstances exist."); Cyrus D. Mehta, *Beware of Indefinite Detention under the USA PATRIOT Act*, Immigration Daily, *available at* http://www.il.com/lawyers/articles/2001,1130-Mehata.shtm.

Furthermore, after September 11, 2001, Congress conferred substantial authority concerning national security upon the executive branch. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001); 66 Fed. Reg. 48,334-35 (Sept. 20, 2001). Under the PATRIOT Act, the Attorney General is authorized to certify that he "has reasonable grounds to believe" that an alien is engaged in terrorist activity or in any other activity endangering the national security.[5] PATRIOT Act, § 412(a), 115 Stat. 350. An alien suspected of terrorist activity must be taken into custody and may be held without charge for up to seven days, after which the government must begin deportation proceedings or bring criminal charges against the

[5] The definition of "terrorist activity" includes the use of a "firearm, or other weapon or dangerous device." 115 Stat. 345 § 411(a)(1)(E)(ii); Civil Liberties and Proposed Anti-Terrorism Legislation: Hearings Before the Subcomm. On the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 107th Cong. 6 (2001) (statement of Prof. David Cole) (observing that the definition of "terrorist activity" might encompass the action of a "bar room brawl in which one party threatens another with a broken beer bottle"), *available at* 2001 WL 1171720.

alien. *Id.* § 412(a). Detention continues until the government decertifies the alien, even if he is granted relief from removal. *Id.*

If removal is unlikely in the "reasonably foreseeable future," the alien may be detained for additional periods of up to six months if his release would "threaten the national security of the United States or the safety of the community of any person." *Id.* The Attorney General must review the detention of the aliens certified under the PATRIOT Act every six months and report to Congress the number of aliens certified, grounds for certification, and duration of detention.[6] *Id.* § 412(c). In April of 2002, the Attorney General reported to Congress that not a single immigrant was certified as an alien terrorist. Robyn E. Blumner, *Ashcroft's Power to Detain Without Charges Continues without Oversight*, St. Petersberg Times, May 5, 2002, at D6. The administrative regulations to enact the PATRIOT Act permit the indefinite detention of aliens who are suspected of terrorist activity or who are taken into custody during a time of emergency. 66 Fed. Reg. 48,334-35 (Sept. 20, 2001) (to be codified at 8 C.F.R. 287.3).

Even after the creation of the Department of Homeland Security (which now maintains responsibility for most immigration law enforcement functions), the Attorney General retains discretionary authority to detain inadmissible aliens under carefully defined circumstances. *E.g.*, 8 U.S.C. § 1226(c) (Attorney general is required to detain and has the power to release certain criminal aliens); 8 U.S.C. § 1231(a)(6) (2000) (detention of inadmissible aliens); 8

[6] According to administrative regulations, an inadmissible alien's detention under Section 1231(a)(6) is reviewed annually. 65 Fed. Reg. at 80,297 (Dec. 21, 2000).

U.S.C. § 1537(b)(2)(C) (2000) (concerning post-removal detention of aliens who cannot be removed). Recently, the Attorney General claimed broad authority "controlling legal and policy determinations regarding whether individual aliens should be detained." *In re D-J*, 23 I. & N. Dec. 572, 573-74 (BIA 2003) (citing "considerations of sound immigration policy and national security" to deny bond to a detained alien and asserting that the Attorney General "retains his authority to make controlling determinations with respect to questions of law," even though authority to administer the INA was transferred to the Secretary of Homeland security). These examples reveal that applying *Zadvydas* to excludible aliens will not impede the government's efforts to protect national security.

3. Detention of Admitted Aliens After *Zadvydas*

Even the regulations implemented in response to *Zadvydas* afford the political branches ample authority to protect national security and prevent terrorism. The Attorney General has enacted specific administrative regulations to guide immigration officials in implementing the *Zadvydas* decision for admitted aliens. 8 C.F.R. §§ 241.12-.13 (2003); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001) (considering factors for the likelihood of removal to include immigrant's prior efforts to comply with the removal order) (to be codified at 8 C.F.R. pt. 3, 241). These regulations authorize detention for "special circumstances," which are defined as (1) aliens with highly contagious disease; (2) "specially dangerous" removable aliens; (3) aliens whose release would have "serious adverse foreign policy consequences;" and (4) aliens detained due to "security or terrorism concerns." 66 Fed. Reg. at 56,979-82 (Nov. 14, 2001) (to be codified at 8 C.F.R. § 241.14). Immigration judges and the Board of Immigration Appeals may review whether continued

detention upon these grounds is appropriate. No such review, however, is permitted if the Attorney General certifies that an alien should not be released for reasons, including foreign policy consequences, terrorism, or security concerns. Just as *Zadvydas* did not impinge the ability of the political branches to protect national security as applied to admitted aliens, neither will it as applied to excludable aliens, such as Mr. Benitez.

II. The Eleventh Circuit Erred In Relying Exclusively Upon Border and National Security Concerns To Justify Indefinite Detention

The Eleventh Circuit erred in considering attenuated border security concerns to uphold Mr. Benitez's indefinite detention when his case presented no national security concerns. *Benitez*, 337 F.3d at 1300. In limiting *Zadvydas*, the lower court reasoned that "the government historically has enjoyed broad latitude in detaining those aliens until their security threat can be fully ascertained" and concluded that "[r]emoving this important tool from the government's arsenal undoubtedly would subject the residents of this nation to greater security risks." *Id.* The record included no suggestion that Mr. Benitez's indefinite detention is warranted by concerns for national security or border security. Instead, the Eleventh Circuit referred only to vague and indirect benefits upon "security" in justifying Mr. Benitez's indefinite detention. *See id.* (discussing Mr. Benitez's potential for recidivism and concluding generally that he "poses a danger to the community and is likely to engage in further violent behavior, and therefore is a security threat").

A. Mariel Cubans, Such As Mr. Benitez, Are Not A Threat To National Security

Current threats to national security do *not* include inadmissible aliens such as Mr. Benitez. The government

does not perceive Mr. Benitez as a threat to national security or a suspected terrorist. After September 11, 2001, the political branches have enacted numerous systems to identify and monitor individuals who may be threats to national security, including the National Security Entry/Exit Registration System (NSEERS), Student and Exchange Visitor Information System (SEVIS), and the United States Visitor and Immigrant Status Indication Technology (US VISIT).[7]

For example, as part of its efforts to enhance national security, the INS required foreign males from eighteen countries to register with the INS as part of the NSEERS. This registration requirement applied to males of age sixteen or older.[8] In recognition that aliens emigrating to the United

[7] *See* U.S. Immigration and Customs Enforcement (ICE), Investigations: National Security (last modified Feb. 5, 2004), *available at* http://www.ice.gov/graphics /enforce/invest/index. htm; *see also* Department of Homeland Security, *Press Room: Changes to the NSEERS Process*, (Dec. 1, 2003), *available at* http://www.dhs.gov/dhspublic/ theme_home8.jsp ("We have caught suspected terrorists under NSEERS. While they may not be charged with terrorism grounds of inadmissibility or removability, that is not an indication of whether terrorists were caught."); United States General Accounting Office, *Homeland Security: Challenges to Implementing the Immigration Interior Enforcement Strategy*, at 11 Apr. 10, 2003 (GAO-03-660T), *available at* http://www.gpoaccess.gov/gaoreports/index. html.

[8] U.S. Citizenship and Immigration Services, *Statement: INS Reminds Certain Temporary Foreign Visitors of Eighteen Countries of Registration Requirement* (Dec. 6, 2002), *available at* http://uscis.gov/graphics /publicaffairs/pachron.htm (describing the goals of NSEERS as "helping the U.S. to identify wanted criminals and known terrorists entering our borders").

States are not threats to national security, the registration requirement does not apply to lawful permanent residents or asylum applicants. *Id.* Of those who registered for NSEERS, 2,870 were detained and 23 were placed in custody.[9] These individuals were detained under authority other than Section 1231(a)(6).

Finally, of the eighteen countries listed in NSEERS, Cuba was not one of the countries listed.[10] These executive regulations and practices reveal that Mariel Cubans, such as Mr. Benitez, do not constitute threats to national security.

B. Unsubstantiated Border Security Concerns Cannot Justify Indefinite Detention

Under the Eleventh Circuit's rationale, vaguely alleged and unsubstantiated border security concerns could justify indefinite detention of all inadmissible aliens, many of whom do not pose a threat to national security. The Eleventh Circuit relied partly upon concerns over border security to uphold Benitez's indefinite detention. *Benitez*, 337 F.3d at 1300. Nonetheless, these concerns are clearly not present in this case. By upholding Mr. Benitez's indefinite detention when no national security concerns were present or even suggested, the Eleventh Circuit's decision implies that any inadmissible alien could be detained upon these unsubstantiated grounds.

In other areas of constitutional law, the government's reference to vague national security justifications were insufficient to justify governmental action. *See N.Y. Times*

[9] Department of Homeland Security, *Changes to National Security Entry/Exit Registration System (NSEERS)* (Dec. 1, 2003), *available at* http://www.dhs.gov /dhspublic/theme_home8.jsp.

[10] *Id.*

Co. v. United States, 403 U.S. 713, 719 (1971) (observing that "[t]he word 'security' [in a discussion about national security] is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment"); *see also People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1243 (D.C. Cir. 2003); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 204, 219 (3d Cir. 2002) ("We defer only to the executive insofar as it is expert in matters of national security, not constitutional liberties."); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 705 (6th Cir. 2002) (determining that courts must require particularized evidence supporting the assertion that national security is implicated in a particular First Amendment case); *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998), *limited on other grounds, United States v. Lazcano-Villalobos*, 175 F.3d 838, 847 (10th Cir. 1999); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990) (fear of terrorist threat without evidence not sufficient to restrict speech).

Zadvydas recognized instances of suspected terrorism as one instance when determinations of the national government would have receive more deference from courts. 533 U.S. at 696. The heightened deference, however, was limited to cases where the alien posed a genuine threat to national security. Here, the Eleventh Circuit cited generally to national security concerns, but then upheld Mr. Benitez's detention without any evidence or even suggestion by the government that Mr. Benitez was a suspected terrorist. *See Benitez*, 337 F.3d at 1300. In upholding indefinite detention of an excludable alien who does not pose a threat to national security, the Eleventh Circuit eviscerated the narrow exception, recognized in *Zadvydas*, when governmental determinations concerning prolonged detention would be entitled to greater deference.

C. *Mezei* and *Carlson* Do Not Justify Indefinite Detention Here

This Court has upheld prolonged detention of inadmissible aliens, but only upon a finding that the alien was a suspected terrorist or national security risk. It has never expressly authorized post-removal indefinite detention of excludable aliens when national security concerns or other special circumstances were not present. In these cases, the Court accepted the government's contention that the alien presented a threat to national security, and upheld the detention. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) (upholding post-removal detention without a hearing when exclusion was "grounded on danger to the national security"); *Carlson v. Landon*, 342 U.S. 524, 534-35 (1952) (detention of Communists during deportation proceedings without bail).

In *Mezei*, the Court considered whether the government was required to provide a hearing concerning reentry when the government alleged Mezei was a threat to national security. *Mezei*, 345 U.S. at 216, 227. Here, the Court divided over the evidence necessary for demonstrating that an alien constitutes a threat to national security. The majority accepted the government's allegations on their face, upholding the alien's detention without a hearing on national security grounds. *Id.* at 214 (stating that Mezei "simply left the United States and remained behind the Iron Curtain for 19 months"). In contrast, the dissenting opinion recognized the "Communist evil," but concluded that detention of an alien was no longer warranted when removal was not possible. *Id.* at 227.

In *Carlson*, the Court upheld the Attorney General's authority to detain aliens who participated in Communist activities. Here, release of the alien during deportation proceedings could result in "opportunities to hurt the United States during the pendency of deportation proceedings."

Carlson, 342 U.S. at 538, 542 ("There is no denial of the due process of the Fifth Amendment under circumstances where there is a reasonable apprehension of hurt from aliens charged with a philosophy of *violence against this Government*.") (emphasis added).

Both *Mezei* and *Carlson* occurred during a time when the political branches made a determination, as a matter of immigration policy, that Communists were a threat to national security. As of 1949, a Congressional report estimated that 3,278 could not be deported because a foreign country refused to issue travel documents. Of these "undeportables," 2,147 were "iron-curtain nationals, including 1,180 Russians." S. Rep. No. 1515, at 637, 639 (1950); *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1389 (10th Cir. 1981) (discussing the Internal Security Act of 1950 and the Immigration Naturalization Act of 1952, which limited post-deportation order detention to six months even though they were passed during a time when "Congress was painfully aware" of the undeportables). In upholding detentions at issue in *Mezei* and *Carlson*, the Court deferred to the political branches' determinations that aliens affiliated with Communism constituted a threat to national security.

Although cases such as *Mezei* and *Carlson* have been cited to uphold indefinite detention of inadmissible aliens, they are actually cases concerning deference to the government on matters of national security. In these cases, the Court upheld the government's individualized determination that the particular alien at issue actually constituted a threat: specifically, that the alien could be a terrorist or serious threat to national security. *See Mezei*, 345 U.S. at 216; *see also Rosales-Garcia v. Holland*, 322 F.3d 386, 413-14 (6th Cir. 2003) (en banc) ("[T]he *Mezei* Court explicitly grounded its decision in the special circumstances of a national emergency."); *Rodriguez-Fernandez*, 654 F.2d

at 1388 (distinguishing *Mezei* on grounds of national security).

In this same vein, *Zadvydas* recognized two instances when the government would be entitled to more deference in prolonged detention. *Zadvydas*, 533 U.S. at 696. Under these exceptions, detention of an alien who is a suspected terrorist or a person with a serious mental illness would be permissible under *Zadvydas*. Such a detention would also be permissible under provisions separate and independent from Section 1231(a)(6), which pertain to suspected terrorists. *See id*. Absent an individualized determination that an alien is a threat to national security, indefinite detention is not appropriate. *Bezman v. Ashcroft*, 245 F. Supp. 2d 446, 450-51 (D. Conn. 2003) (civil confinement pending appeal on bond determination). Although upholding prolonged detention of aliens upon grounds of national security, this Court has not sanctioned indefinite detention of aliens, such as Mr. Benitez, who were not national security threats. Thus, the Eleventh Circuit erred in basing its decision upon attenuated security concerns when this case presents no finding or suggestion of a threat to national security.[11]

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[11] Even if the Attorney General argues that the current statutory and administrative regimes are not effective for protecting border security after *Zadvydas*, then the proper forum for resolving the Government's concerns regarding national security is Congress – not the courts. *See United States v. Witkovich*, 140 F. Supp. 815, 820 (N.D. Ill. 1956) ("[I]f it is physically impossible to deport him, and if increasing numbers of aliens in this situation has created a serious problem, then Congress may solve it."), *aff'd*, 353 U.S. 194 (1957).

III. Excludable Aliens Are Being Indefinitely Detained With No Significant Possibility of Removal

A. Post-Order Detention On Criminal Recidivism Grounds Violates *Zadvydas*

Based solely upon an administrative determination that an excludable alien, such as Mr. Benitez, has criminal tendencies, the Eleventh Circuit upheld the government's authority to indefinitely detention such aliens under Section 1231(a)(6). In its decision, the court distinguished *Zadvydas*, which disallowed indefinite detention under the exact same statutory provision used to detain excludable aliens. Section 1231(a)(6) applies to inadmissible aliens, which encompasses excludable aliens such as Mr. Benitez. Contrary to the Eleventh Circuit's decision, *Zadvydas* is binding precedent for the statutory interpretation of the permissible length of detention.

The Eleventh Circuit described the issue as whether an excludable alien has a "right to parole." *Benitez*, 337 F.3d at 1300. This fundamentally misunderstands the Court's holding in *Zadvydas* and the constitutional concerns raised by indefinite detention based upon an informal administrative proceeding. Like *Zadvydas*, this case addresses whether an administrative decision may require post-removal indefinite detention of an excludable alien: there is no significant possibility of the aliens' removal, there has been no adjudicative determination of his future dangerousness, and there has been no criminal proceedings charging him with suspected terrorism. Also like *Zadvydas*, this case does not involve border security concerns when the government has particular information concerning the excludable aliens. *See Zadvydas*, 533 U.S. at 695-96 (commenting that the case did not involve the "political branches' authority to control entry into the United States"). Finally, this case does not present the question of the national government's authority to detain

aliens for a reasonable time pending their removal. Like other aliens subject to indefinite detention, Mr. Benitez is challenging neither the removal order, nor INS authority to detain aliens during removal proceedings. *Benitez*, 337 F.3d at 1292-93.[12]

Mr. Benitez epitomizes the group of inadmissible aliens who cannot be removed from the United States because no foreign country will accept them. An administrative determination, without judicial review, subjects these aliens to post-removal indefinite detention under Section 1231(a)(6). Because there is no significant likelihood of removing such an alien to a foreign country, the purpose of continued detention is clearly not to effectuate the removal order. Rather, like the detention in *Zadvydas*, the purpose of this detention can only be preventive: either to prevent flight or protect the community from a criminal who has already served his time. As the Court recognized in *Zadvydas*, the government's interest in preventing flight diminishes as a grounds for detaining the alien when it is not possible to effectuate his removal. *Zadvydas*, 533 U.S. at 690. Thus, the only grounds for detaining Mr. Benitez is that he might pose a risk of criminal recidivism.

Mr. Benitez's indefinite detention is not justifiable on grounds other than potential recidivism. For example, the record does not include any finding of special circumstances,

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[12] The Eleventh Circuit cited cases in which admitted or resident aliens are entitled to greater procedural protections than excludable aliens in determining whether they are entitled to remain in the country. *Benitez*, 337 F.3d at 1296-97. These cases are inapposite, however, because Mr. Benitez is not challenging the procedures used to enter his removal order. The only issue is whether the government may subject excludible aliens to indefinite post-removal detention.

such as serious mental illness, that would satisfy the criteria for civil commitment. Additionally, the government has offered no argument that he constitutes a threat to national security. Nor is there any evidence to imply that he is a suspected terrorist. Like the detention prohibited in *Zadvydas*, Mr. Benitez is being indefinitely detained because of an administrative determination that he poses a danger to the local community. With no significant possibility of removal to Cuba or any other country, Mr. Benitez's continued detention under Section 1231(a)(6) violates *Zadvydas*.

B. Adoption Of the INS's Reading Would Have Broad Ramifications

The Eleventh Circuit's decision permits indefinite detention of excludable aliens, even if they have not committed a serious offense. When a foreign country refuses to accept an excludable alien, such as Mr. Benitez, the only purpose of his ongoing indefinite detention is preventive: to protect the local community from a potential criminal recidivist.

Yet, in upholding indefinite detention of excludable aliens on these grounds, the Eleventh Circuit's decision has broad ramifications. It sanctions authority for the executive branch to detain indefinitely inadmissible aliens, even ones who have not committed a serious offense. A broad category of aliens are subject to removal, including aliens who are convicted of crimes of moral turpitude or of "miscellaneous crimes." 8 U.S.C. § 1226(c) (2000). After a removal order has been entered, inadmissible aliens are detained under Section 1231(a)(6). Thus, the Attorney General may impose post-removal detention on aliens who were ordered removed for many reasons, including tourist visa violations. *E.g.*, *Borrero v. Aljets*, 325 F.3d 1003, 1006 (8th Cir. 2003); *Bini v. Aljets*, 36 Fed. Appx. 868, 869 (8th Cir. 2002) (upholding continued detention for alien who committed two crimes of moral turpitude); *Elkins v. Comfort*, 245 F. Supp. 2d 1161, 1163 (D. Colo. 2003) (alien was excludable partly for lacking an immigrant visa, even though the alien was married to a United States serviceman).

Section 1231(a)(6) is distinguishable from the statute upheld in *United States v. Salerno*, 481 U.S. 739 (1987), which provided for detention limited to a finite time period and was confined to people who were involved in serious crimes. *Id.* at 747. In contrast, under the Eleventh Circuit's decision, aliens convicted of a non-serious crime could be subject to indefinite detention.

C. Prolonged Detention Is Warranted Only By Special Circumstances, Which Are Not Present Here

This Court has upheld prolonged detention only upon judicial determination of special circumstances warranting detention. Under the lower court's decision, an excludable alien may be indefinitely detained under Section 1231(a)(6) with no judicial proceeding and no judicial review of the administrative decision. Administrative regulations generally govern post-removal detention of excludable aliens beyond the ninety-day removal period. 8 C.F.R. § 241.4 (2003) (regulations concerning when the Attorney General exercises discretion to detain under Section 1231(a)(6)). Separate administrative regulations, however, apply to Mariel Cubans. 8 C.F.R. § 212.12 (2003) (Cuban Review Plan). Although the Cuban Review Plan provides seven factors to be considered in the administrative parole determination, the administrative regulations do not require a finding of special circumstances to uphold indefinite detention. Furthermore, neither possibility of repatriation nor length of detention is listed in the Cuban Review Plan, both of which were crucial factors discussed in *Zadvydas*. *See id.* § 212.12(d)(3). Hence, the administrative decision-maker may indefinitely

detain inadmissible aliens without analyzing the very factors that made the detention impermissible in *Zadvydas*.

Even in the immigration context, there is an arbitrariness limit to government treatment of aliens, which applies to post-removal detention. *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). Lower court cases suggest that some administrative determinations arbitrarily impose post-removal indefinite detention. *E.g., Gonzalez v. Ashcroft*, 278 F. Supp. 2d 402, 416 (D.N.J. 2003) (holding that detention for more than one year without parole review violates Cuban Review Plan). Even post-*Zadvydas* cases suggest agency reluctance to implement this Court's decision as applied to admitted aliens.[13] For example, in one case, the INS repeatedly recommended release of a Liberian national during his four-year detention until he filed a habeas petition, at which time the INS revoked its recommendation. *E.g., Seretse-Khama v. Ashcroft*, Civ. No. 02-0955, 2002 U.S. Dist. LEXIS 13547, **12, 33 (D.D.C. July 22, 2002) (describing the INS response as "woefully short" to the alien's showing that he was not likely to be removed). The court held that nothing in the record explained why the alien was not released. *Id.*

Outside of the context of immigration policy, courts have found excludable aliens fall within the protection of the Constitution, including protections during a criminal trial. *E.g., Plyler v. Doe*, 457 U.S. 202 (1982) (alien children may

[13] Elizabeth Amon, *INS Flouts High Court on Prisoners, Critics Say*, Nat'l L.J., Aug. 15, 2002, http://www.law.com/jsp/article.jsp?id=1028906395219 (discussing *Kasarov et al. v. Ashcroft*, No. 1:02-CV-5097 (N.D. Ill. July 25, 2002), which is a class action suit alleging that the government "has implemented regulations that have the effect of obstructing and hindering the Supreme Court's decision" in *Zadvydas*).

claim benefit of the Equal Protection Clause of the Fourteenth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896) (substantive due process); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *see also Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir. 1987) (noting excludable aliens are persons under the Fourteenth Amendment). When no foreign country will accept the alien, post-removal detention is not solely in the immigration context, and other constitutional concerns apply to determine whether the indefinite detention is permissible. Even within the immigration context, excludable aliens possess some due process rights concerning their physical liberty in the means of implementing immigration policy. *E.g., Ngo v. INS*, 192 F.3d 390, 399 (3d Cir. 1999) (excludable aliens are entitled to periodic review of their continued detention if they cannot be removed); *see also Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) (excludable aliens have protection under due process clause from intentionally abusive detention conditions).

The Eleventh Circuit erred in upholding indefinite civil detention of an excludable alien under Section 1231(a)(6). Unless warranted by special circumstances, such indefinite detention does not effectuate an alien's removal when a foreign country refuses to accept an alien in detention. Thus, detention must be justified on other grounds, but the Eleventh Circuit fails to do so. *E.g., United States ex rel. Ross v. Wallis*, 279 F. 401, 403-04 (2d Cir. 1922) ("[T]he right to deport does not include any right of indefinite imprisonment under the guise of awaiting an opportunity for deportation."); *Petition of Brooks*, 5 F.2d 238, 239 (D. Mass. 1925) ("The right to arrest and hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as punishment for a

crime."). To be upheld, indefinite civil detention must be non-punitive and justified by special circumstances, such as serious mental illness. *Zadvydas*, 533 U.S. at 678 (assuming that the objectives for detaining Zadvydas and Ma were non-punitive and concluding that no special justification was present). If an excludable alien is indefinitely detained under Section 1231(a)(6) without a finding of special circumstances, then his detention is punitive.

Congress may not enact legislation that punishes aliens without providing for a criminal trial--this principle applies to excludable aliens in post-removal detention. *See Zadvydas*, 533 U.S. at 704 (Scalia, J., dissenting) (aliens cannot be tortured); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding detainee may not be punished without an adjudication of guilt per the due process clause); *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896) (striking statute that imposed hard labor on aliens in detention after deportation order issued). When an alien is subject to post-removal indefinite detention with no significant possibility of removal, that detention constitutes punishment unless justified on other grounds. Because INS does not have adequate detention facilities, many aliens, including Mr. Benitez, are detained in federal and state prison facilities. *Armentero v. INS*, 340 F.3d 1058, 1068 (9th Cir. 2003) (reporting that more than 10,000 immigrants are detained in local jails and state prisons) (citing Michael Welch, Detained: Immigration Laws and the Expanding INS Jail Complex 108 (2002)). Because the INS cannot effectuate his removal to another country, an excludable alien's ongoing indefinite detention becomes impermissible punishment, which may be justified only in a judicial proceeding.

Rather than release excludable aliens under orders of supervision, the government continues to detain them even though they cannot be removed. This indefinite detention is based solely upon an informal administrative determination

that they presents a danger to the community as potential recidivist. In *Zadvydas*, the Court rejected potential criminal recidivism as a sufficient basis for indefinite detention of inadmissible aliens. This Court explicitly distinguished such indefinite detention from two cases in which prolonged detention would be authorized on grounds other than Section 1231(a)(6). First, terrorism is a case when "special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas*, 533 U.S. at 696. Second, the Court has upheld prolonged civil commitment when such detention is "limited to specially dangerous individuals and subject to strong procedural protections," which capture only those cases where there is a "special justification" such as a "harm-threatening mental illness." *Zadvydas*, 533 U.S. at 690-91; *see also Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding detention scheme with stringent procedural protections that confines "a small segment of particularly dangerous individuals" who had a mental abnormality); *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992) (holding due process prohibits indefinite detention of an insanity acquittee and determining state failed to establish danger to society by clear and convincing evidence).

Because there is no reasonable possibility of removing excludable aliens, such as Mr. Benitez, the government cannot claim that he is being detained for a limited period to effectuate the removal order. In other cases, the Court has upheld detention when it is of limited duration. *E.g.*, *Schall v. Martin*, 467 U.S. 253, 269 (1984) (upholding pretrial detention of juvenile, which is "strictly limited in time"); *Jones v. United States*, 463 U.S. 354, 368, 370 (1983) (authorizing civil commitment of a person, who receives an insanity judgment, only for the period during which the person was both mentally ill and dangerous); *Carlson v.*

Landon, 342 U.S. 524 (1952) (considering detention of potentially dangerous aliens during period pending determination of deportability, which is typically short time period); *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981) (upholding detention pending deportation because it is "justifiable only as a necessary, temporary measure"). In contrast, detention is not limited in duration when the excludable alien cannot be removed.

Furthermore, in cases upholding "preventive detention . . . of potentially *indefinite* duration," however, the potential for recidivism has never been enough, and the Court required "some other special circumstance, such as mental illness, that helps to create the danger." *Zadvydas*, 533 U.S. at 691; *see also Kansas v. Crane*, 534 U.S. 407, 412 (2002) (requiring a lack of control determination "lest 'civil commitment' become a 'mechanism for retribution or general deterrence' -- functions properly those of criminal law, and not civil commitment") (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (Kennedy, J., concurring)). Moreover, in each of these cases, a judicial proceeding determined the special circumstances and limited time period. David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003, 1014 (2002) (recognizing that "with the exception of enemy aliens during wartime, the Supreme Court has upheld civil detention" only after a judicial proceeding to determine individualized need).

Unlike the cases in which the Court has upheld confinement, Mr. Benitez's detention is of unlimited duration and imposed by an administrative determination, which did not require special circumstances. Thus, this case is unlike *United States v. Salerno*, which upheld pretrial preventative detention because there was a short time until trial, detention was reserved for the "most serious of crimes," and detention was imposed only after complying with judicial protections,

including proof of dangerousness by clear and convincing evidence. 481 U.S. 739, 747, 750-52 (1992). Civil detention of a limited time period has been upheld only under judicial determination of special circumstances, such as severe mental illness. Unlike the detention at issue in *Salerno*, indefinite detention under Section 1231(a)(6) is neither limited in time period nor reserved to the most serious criminals. It is undisputed that no judicial proceeding or finding of special circumstances occurred here. The only ground to justify Mr. Benitez's detention under Section 1231(a)(6) is preventative: to protect the local community from the mere hunch that he is a criminal recidivist. This does not satisfy the doctrinal requirements for upholding civil detention. Such ongoing detention of excludable aliens becomes punishment, which is prohibited without a judicial proceeding.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE LAWYERS COMMITTEE FOR HUMAN RIGHTS,* HUMAN RIGHTS WATCH, AND AMNESTY INTERNATIONAL USA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. Statutes Must Be Construed to Comply With International Law and Internationally Accepted Human Right Standards	5
II. The Indefinite Detention of Aliens Without Meaningful Judicial Review Is Incompatible With International Law and Internationally Accepted Human Rights Standards	10
A. International Law Prohibits Arbitrary Detention	11
B. Indefinite Detention Under 8 U.S.C. § 1231(a)(6) Violates the Prohibition Against Arbitrary Detention Under International Law	18
C. The "Entry Fiction" Provides No Basis for the Violation of Basic Human Rights	24
CONCLUSION	26

TABLE OF AUTHORITIES

Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF THE *AMICI CURIAE*[1]

Since 1978, the Lawyers Committee for Human Rights (now known as Human Rights First) has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity, and respect for the rule of law. It has worked to promote U.S. compliance with international refugee and human rights law, and to help refugees gain political asylum through a pro bono legal representation program, which currently represents more than 1000 clients from 88 countries. Since September 11, 2001, Human Rights First has also worked to promote greater understanding of and respect for national and international human rights laws in U.S. national security policy. Human Rights First believes this case presents an issue at the heart of its work to ensure that the United States observes core international human rights protections in all of these areas.

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear

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[1] This brief is filed with the written consent of the parties. Letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

upon offending governments and others and thus bring pressure on them to end abusive practices.

Amnesty International USA, established in 1966, is the U.S. arm of Amnesty International, a worldwide grassroots movement that promotes and defends human rights. Amnesty International USA's mission is to act in concert with the international human rights movement to prevent and end grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks the Court to decide whether Congress has authorized the Executive Branch to subject inadmissible aliens[2] to indefinite detention without a meaningful opportunity for independent judicial review. The answer to this question must be "no." All individuals have the right to be free from arbitrary detention under well-established standards of international human rights law. Respondents' reading of § 1231(a)(6) would attribute absolute authority to the Executive Branch to deprive aliens of this fundamental right. This Court rejected Respondents' reading in *Zadvydas v. Davis*, 533 U.S. 678 (2001), concluding that 8

[2] Aliens are "inadmissible" if they are ineligible for an official "lawful entry . . . into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(13)(A) (defining "admission" and "admitted"); *see also* 8 U.S.C. § 1182(a) (defining classes of aliens ineligible for admission).

U.S.C. § 1231(a)(6) must be read to comply with constitutional guarantees of due process. In light of unambiguous international law prohibiting the kind of indefinite detention Respondents say the statute permits, the Court should reach the same conclusion here.

Section 1231(a)(6) must be interpreted and applied in compliance with international law, as "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993) (quoting *The Schooner Charming Betsy* and labeling the principle a "canon of statutory construction"). This principle applies particularly strongly to statutory constructions that would render a statute a violation of international human rights laws. Congress should always be assumed to have intended respect for the essential rights shared by all human beings.

International law unequivocally prohibits arbitrary detention. This prohibition, which has long been recognized by the United States, is embodied in numerous international and regional human rights instruments – including instruments to which the United States is bound – and in the municipal laws of the democratic nations of the world. The prohibition affords protections to all people, regardless of their nationality or immigration status. It forbids states to detain persons unnecessarily or for unnecessarily long periods, regardless of whether the detention is carried out pursuant to municipal law. A state seeking to infringe an individual's liberty bears the burden of showing a reasonable necessity for doing so and must provide the detainee with a meaningful opportunity for independent judicial review. Thus, although a sovereign

state may expel unwelcome aliens from its territory and may detain aliens when detention is a reasonably necessary step toward expelling them, it may not detain them unnecessarily or without affording them adequate procedural protections.

Section 1231(a)(6), if read to authorize indefinite detention of inadmissible aliens, would violate the international prohibition on arbitrary detention. Under such a reading, the provision would permit the permanent deprivation of liberty even in cases in which no substantial justification exists. The limited opportunity for review of detention orders under § 1231(a)(6) is inadequate to support indefinite detention under the applicable standards.

Zadvydas recognized the existence of this prohibition in the U.S. Constitution, and there is no reason to restrict this Court's holding in *Zadvydas* to deportable,[3] as opposed to inadmissible, aliens. To the contrary, under international law, all individuals are endowed with human rights irrespective of their immigration status. The practical impossibility of repatriation does not diminish an alien's right to be free from arbitrary detention. Neither does the fiction that an alien paroled into the United States by the government has never entered the territory of the United States. If detention of a person is not reasonably necessary to accomplish a legitimate purpose, it is arbitrary and therefore impermissible under international law.

[3] Aliens are "deportable" if they have been officially admitted into, and are present in, the United States, and there is a statutory ground for removing them. *See* 8 U.S.C. § 1227(a) (defining classes of deportable aliens).

Amici therefore ask the Court to reverse the Court of Appeals and to hold that the reasonableness limitation to the Attorney General's[4] authority under § 1231(a)(6), as established in *Zadvydas* with regard to deportable aliens, applies to inadmissible aliens as well.

ARGUMENT

I. Statutes Must Be Construed to Comply With International Law and Internationally Accepted Human Right Standards

The statute in question in this case empowers the Executive Branch to detain a deportable or inadmissible alien who is ordered removed "beyond the removal period." 8 U.S.C. § 1231(a)(6). The exercise of this power is constrained by the U.S. Constitution. *Zadvydas*, 533 U.S. at 721. It is also constrained by the basic human rights protections contained in international law.

This Court has long admonished that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118. This rule of construction not only helps ensure that U.S. laws are interpreted and applied with "a decent respect to the opinions of mankind," Declaration of Independence ¶ 1, it

[4] The Homeland Security Act of 2002 transferred the functions of the former Immigration and Naturalization Service from the Department of Justice to the Department of Homeland Security. Homeland Security Act of 2002, Pub.L. No. 107-296, § 451, 116 Stat. 2135, 2195 (2002) (codified at 6 U.S.C. § 271 (Supp. 2003)). Section 1231(a)(6) has yet to be amended and still refers to the Attorney General.

is also required by international commitments that bind the United States. U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby."); *Edye v. Robertson*, 112 U.S. 580, 598–99 (1884) (recognizing that a ratified treaty is the "law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."). Indeed, as this Court recognized long ago, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Beyond even this, however, due attention to the "opinion of the impartial world" has often been urged by former and present members of this Court. In his dissenting opinion in *Zadvydas*, Justice Kennedy, joined by the Chief Justice, cited international standards regarding the detention of refugees and asylum seekers in the form of a Report of the United Nations Working Group on Arbitrary Detention and the Guidelines of the United Nations High Commissioner for Refugees to support the proposition that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." 533 U.S. at 721 (Kennedy, J., dissenting). Justice Kennedy's attention to international custom and practice follows in a long tradition of American jurisprudence. As James Madison wrote in *The Federalist* No. 63:

> An attention to the judgment of other nations is important to every government . . . [because] in doubtful cases, particularly where the national councils may be warped by some strong passion, the presumed or known opinion of the impartial world may be the best guide that can be followed. . . . [H]ow many errors and follies would [America] have avoided, if the justice and propriety of her measures had in every instance been previously tried by the light in which they would probably appear to the unbiased part of mankind?

The Federalist No. 63, at 318 (James Madison) (G. Wills ed., 1982).

Accordingly, when the right of the United States to exclude foreigners came before the Court in 1893, the Court relied on international law and practice to support this sovereign prerogative. *Fong Yue Ting v. United States*, 149 U.S. 698, 707–11 (1893). Likewise, the *Miranda* decision, which has come to symbolize the core of U.S. protections of the rights of the accused, considered law enforcement experiences in England, Scotland, and India in interpreting the Fifth Amendment. *Miranda v. Arizona*, 384 U.S. 436, 488–90, 521–22 (1966). Justice Blackmun also later emphasized that "'evolving standards of decency' should be measured, in part, against international norms." Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 45–46 (1994).

More recently, this Court has recognized the importance of looking to the "opinions of mankind" in addressing numerous problems that have come before it. Justice O'Connor has noted that "conclusions reached by other countries and by the international community should at

times constitute persuasive authority in American courts."[6] And Chief Justice Rehnquist has similarly observed that "it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."[7] Looking to the views and experiences of other countries is an essential – and expanding – part of this Court's jurisprudence. Justice O'Connor has described this development:

> As the American model of judicial review of legislation spreads further around the globe, I think that we Supreme Court Justices will find ourselves looking more frequently to the decisions of other constitutional courts, especially other common-law courts that have struggled with the same basic constitutional questions that we have: equal protection, due process, the Rule of Law in constitutional democracies. Some, like the South African court, are relative newcomers on the scene but already have entrenched themselves as guarantors of civil rights. All of these courts have something to teach us about the civilizing function of constitutional law.

Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* 234 (2003).[7]

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[5] Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

[6] William H. Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), *reprinted in Germany and its Basic Law: Past, Present and Future* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

[7] Other recent opinions that have canvassed international law and the conclusions of other countries include *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003) (Ginsburg, J., concurring); *Atkins v. Virginia*, 536

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The relevance of international and comparative law flows from our common experiences and our collective humanity, which the Founding Fathers invoked in creating this country. The Declaration of Independence rested on the fundamental assumption that all individuals possess certain natural rights prior to the formation of government, and that government is legitimate only to the extent that it protects those rights. Individuals enjoy natural rights by virtue of membership in the human family, not by virtue of belonging to a particular political society. As Professor David Martin has observed, "we usually assume, for good reasons brought home to us by the Court's attempt to hold otherwise in 1857 [in the *Dred Scott* decision], that mere membership in the human species, combined with physical presence, is enough to call our constitutional protections fully into play."[8] Thus, as the Inter-American Commission of Human Rights emphasized with respect to the American Declaration of the Rights and Duties of Man:

> [T]he American Declaration, as a modern human rights instrument, must be interpreted and applied in such a way as to protect the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other States for which the instrument constitutes a source of international

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U.S. 340, 347 n.21 (2002); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16, 785–87 (1997).).

[8] David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165, 176–77 (1983).

> obligation. This basic precept in turn is based upon the fundamental premise that human rights protections are derived from the attributes of a person's personality and by virtue of the fact that he or she is a human being, and not because he or she is the citizen of a particular State.[9]

Amici respectfully submit that both international standards and international law to which the United States is bound are critical in understanding the liberty interest of removable and inadmissible aliens, and in determining what procedural review of detention is adequate to protect this freedom. Adequate review procedures are necessary to satisfy both the due process guarantees of the U.S. Constitution, and international rules and norms prohibiting the arbitrary detention of any individual. But adequate review procedures, while necessary, are not sufficient to assuage concerns that "detention that is indefinite and potentially permanent" may violate both the U.S. Constitution; *Zadvydas*, 533 U.S. at 696, and applicable international law standards, as set forth below.

II. The Indefinite Detention of Aliens Without Meaningful Judicial Review Is Incompatible With International Law and Internationally Accepted Human Rights Standards

International law unequivocally prohibits arbitrary detention, including detention that is unnecessary or that continues for an unnecessarily long time. The international

[9] Report of the Inter-American Commission of Human Rights, Case 9903, Inter-Am. C.H.R., Report No. 51/01 (Apr. 4, 2001), ¶ 178, *available at* http://www.cidh.org/annualrep/2000eng/chapteriii/merits/usa9903. htm.

prohibition on arbitrary detention also requires states to provide procedural safeguards adequate to permit those unjustly detained to secure their release. Section 1231(a)(6), if read to empower the Attorney General to hold immigrants indefinitely, would violate this international prohibition. Moreover, the "entry fiction" – the legal fiction that an inadmissible alien, who in this case was paroled into the United States by the government, has never entered the territory of the United States – provides no basis for concluding otherwise. Particularly in the absence of clear statutory language requiring indefinite detention, the Court should interpret § 1231(a)(6) consistent with its international obligations.

A. International Law Prohibits Arbitrary Detention

No misuse of government power is more clearly established as a violation of international law than the practice of prolonged arbitrary detention. The right not to be unjustly detained, so central to our concept of ordered liberty, is articulated in the earliest documents on personal liberty as well as in the declarations, covenants, treaties, and constitutions that embody modern international law and the laws of free states. Indeed, the right is universally recognized among the democratic nations and among the international bodies that represent the nations of the world.

The Magna Carta, drafted in 1215 in response to abuses of power by the English monarchy, declared that "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we

not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." Blackstone commented that this provision alone merited the title the Great Charter. William Blackstone, IV *Commentaries on the Laws of England* 424 (photo. reprint 1978) (1783). The United States adopted and affirmed the same principle in the Due Process Clause of the Fifth Amendment and did so again with the ratification of the Fourteenth Amendment. *See* U.S. Const. amend. V & XIV.[10]

Modern sources of international law are unanimous in prohibiting arbitrary detention. The most widely respected elaboration of human rights norms of the twentieth century, the Universal Declaration of Human Rights, states plainly that "[n]o one shall be subjected to arbitrary arrest, detention or exile." G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); *see* Jordan Paust, *International Law as Law of the United States* 246 (1996).

The Universal Declaration's travaux préparatoires – its drafting history – make clear that the Declaration's use of the term "arbitrary" refers not only to detentions that are unauthorized by law, but also to detentions that are in accordance with laws that are themselves unjust. *See* 3 U.N. GAOR, Pt. I, Third Comm. 247, 248 (1948) (delegate from the United Kingdom noting that "[t]here might be certain countries where arbitrary arrest was permitted" and that the "object of the article was to show that the

[10] Edward Coke equated the phrase "due process of the law" as it appeared in an English statute of 1354 with the phrase "Law of the Land" in the Magna Carta. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring) (citing Edward Coke, 2 *Institutes* 50 (5th ed. 1797)).

United Nations disapproved of such practices"). The drafters had only recently witnessed the atrocities perpetrated "legally" by Nazi Germany. They thus took care to explain that an unjust detention was not permissible simply because it was authorized by the law of the detaining state. *See generally* Parvez Hassan, *The Word "Arbitrary" As Used in the Universal Declaration of Human Rights*, 10 Harv. Int'l L.J. 225 (1969).

The Universal Declaration's condemnation of arbitrary detention was later codified in the International Covenant on Civil and Political Rights (the "Covenant"). G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.[11] Article 9 of the Covenant sets out the various requirements to ensure against arbitrary detention. Article 9(1) generally provides that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such ground and in accordance with such procedure as are established by law."

As in the Universal Declaration, the word "arbitrary" in the Covenant extends beyond acts unauthorized by state law. The United Nations Human Rights Committee, whose role it is to monitor compliance with the Covenant, observed that "[t]he drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more

[11] The General Assembly of the United Nations adopted the Covenant in 1966, and it entered into force in 1976. As of November 2003 there were 151 parties to the Covenant, including the United States, which ratified it in 1992.

broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law." *Womah Mukong v. Cameroon*, Communication No. 458/1991 (Aug. 10, 1994), U.N. Doc. CCPR/C/51/D/458/1991. "[T]his means," the Committee explained, "that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances." *Id.*

Specifically, under Article 9 of the Covenant, a state must show that the detention is reasonably necessary. Indeed, "the power of a State to detain must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means." Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection, in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 228 (Erika Feller et al., eds., 2003). All unnecessary detentions, therefore, or detentions of unnecessarily long duration, are inherently arbitrary, regardless of municipal law, and so violate international law.

In addition, Article 9(4) of the Covenant requires that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." The Human Rights Committee has interpreted this provision to require States to provide an independent periodic inquiry into the lawfulness of detention by a court without delay.

The regional human rights agreements are also in accord in condemning arbitrary detention, including the

American Convention on Human Rights – which provides that "[e]very person has the right to personal liberty" and that "[n]o one shall be subject to arbitrary arrest or imprisonment," American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, at ch. II, art. 7[12] – and the European Convention for the Protection of Human Rights and Fundamental Freedoms. E.T.S. No. 5, at art. 5 ("Everyone has the right to liberty and security of person."). The European Convention in particular recognizes the importance of procedural protections in assuring that parties unjustly detained may regain their liberty. It requires the state to provide an opportunity for review before a body independent of the executive. *See id.* at art. 5(4) ("Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful."); *Reid v. United Kingdom*, 37 E.H.R.R. 9, 63 (Eur. Ct. H.R. 2003) (holding that the term "court" as used in art. 5(4) of the European Convention is limited to "bodies which exhibit . . . common fundamental features, of which the most important is independence of the executive"). Moreover, because of the importance of the liberty interest, and because prolonged detention is permissible only in exceptional circumstances, it is the state, not the detained party, that must bear the burden of showing the necessity of the detention. *Id.* at 68–71.[13]

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[12] The United States has signed but not ratified the American Convention.

[13] The African Charter on Human Rights and People's Rights contains the same prohibition against arbitrary detention. OAU Doc.

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The lower federal courts of the United States have recognized the prohibition against arbitrary detention under international law. *See, e.g., Alvarez-Machain v. United States*, 331 F.3d 604, 620–21 (9th Cir. 2003) ("[T]here exists a clear and universally recognized norm prohibiting arbitrary arrest and detention."), *cert. granted*, 124 S.Ct. 821 (2003); *de Sanchez v. Blanco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (listing "the right not to be arbitrarily detained" among the small group of "basic rights" that "have been generally accepted"); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.").

The same principles are reflected in the Restatement of Foreign Relations Law, which provides that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention." Restatement (Third) of Foreign Relations Law § 702. A comment to the Restatement explains that the term "arbitrary detention" under international law extends to all detentions that are "'incompatible with the principles of justice or with the dignity of the human person.'" *Id.* at cmt.h (quoting Statement of U.S. Delegation, 13 GAOR, U.N. Doc. A/C.3/SR.863 at 137 (1958)). The Court has repeatedly relied upon the Restatement as an authoritative declaration of the foreign affairs law of the United States. *E.g., C & L Enterprises, Inc. v. Citizen*

CAB/LEG/67/3/Rev. 5, at pt. I, ch. 1, art. 6 ("[N]o one may be arbitrarily arrested or detained.").

Band Potawatomi Indian Tribe, 532 U.S. 411, 421 n.3 (2001); *Weinberger v. Rossi*, 456 U.S. 25, 28 n.5 (1982).

The international norm prohibiting arbitrary detention is also embodied in the municipal laws of the democratic nations of the world. *See, e.g.,* Const. art. 66 (France) (providing that no one shall be arbitrarily detained and charging the judicial authority with ensuring observance of that principle); Cost. art. 13 (Italy) (declaring personal liberty inviolable, forbidding extralegal detention, and requiring that maximum periods for preventive detention be fixed by law). In some states the right is protected by an explicit incorporation into municipal law of international human rights norms. *See, e.g.,* Human Rights Act, 1998, c. 42, § 6(1) (Eng.) ("It is unlawful for a public authority to act in a way that is incompatible with a Convention right [of the European Convention for the Protection of Human Rights and Fundamental Freedoms]."); C.E. art. 10, cl. 2 (Spain) (incorporating into the Constitution of Spain a principle of interpreting rights in conformity with the norms expressed in the Universal Declaration of Human Rights).

In the face of all this, a state's inability to repatriate an alien does not provide a basis for indefinite detention. The United Nations High Commissioner for Refugees has rejected that justification in addressing the detention of stateless persons, those not considered to be nationals of any state. Stateless persons – like nationals of states with which the detaining state lacks a repatriation agreement – are at risk of prolonged detention because there is no nation to which they can be deported. United Nations High Commissioner for Refugees, Guidelines on Applicable Criteria and Standards Relating to the Detention on Asylum-Seekers 2 (Feb. 10, 1999). The Commissioner's

Guidelines make clear, however, that stateless persons are nonetheless "entitled to benefit from the same standards of treatment as those in detention generally." *Id.* at 9. Statelessness "should not lead to indefinite detention" and "cannot be a bar to release." *Id.* Neither, then, may a state justify its indefinite detention of an alien on the ground that the alien's state of origin refuses to accept his return.

The European Convention, too, addresses the rights of immigrants and reaches the same conclusion. It states an exclusive list of exceptions to the principle that "[n]o one shall be deprived of his liberty." European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5, at art. 5. With respect to the expulsion of immigrants, it permits only "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." *Id.* It does not allow for the detention of immigrants against whom no action is being taken and who are not able to be deported. *Cf. Quinn v. France*, E.C.H.R. Case No. 47/1993/442/521, 21 E.H.E.E. 529 (Feb. 25, 1995) (holding that detention by France of U.S. national during excessive delays in proceedings to extradite him to Switzerland violated Article 5 of the European Convention).

B. Indefinite Detention Under 8 U.S.C. § 1231(a)(6) Violates the Prohibition Against Arbitrary Detention Under International Law

The prohibition against arbitrary detention under international law forbids states from detaining people unreasonably or for unreasonably long periods. States may

not infringe individual liberties without showing a reasonable necessity for doing so and must provide a meaningful opportunity for independent judicial review for those who believe they have been unjustly detained. Indefinite detention under 8 U.S.C. § 1231(a)(6) is arbitrary and therefore fails to meet the United States' obligations under international law.

The absence of a time limit on the length of detention under § 1231(a)(6), as currently used by the Attorney General, violates the United States' obligations under international law. In *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997), the Human Rights Committee found that Australia's blanket policy of subjecting asylum seekers to indefinite or prolonged detention violated Article 9 of the Covenant on Civil and Political Rights. The petitioner, an asylum seeker, was detained for more than four years while his status was being determined. Australia argued that detention was necessary to prevent asylum seekers from absconding. The Committee rejected Australia's argument stating that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification." *Id.* at ¶ 9.4.

The Federal Court of Australia later reviewed the Australian government's policy of indefinitely detaining aliens unlawfully present within Australia, pending their removal, even when removal was not practically possible. *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Masri,* 126 F.C.R. 54 (Fed. Ct. Austrl. 2003) (application for special leave to appeal to the High Court

refused, Aug. 14, 2003). Relying in part on *A v. Australia*, the court held that, under the government's construction, the statute would violate Australia's obligations under the Covenant on Civil and Political Rights. *Al Masri*, 126 F.C.R. at ¶¶ 147, 155. It therefore read the statute as containing "an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention." *Id.* at ¶ 155. The court also relied in part on *Zadvydas* in holding that statutes should be construed so as not to violate fundamental rights, absent clear legislative intent to the contrary. *Id.* at ¶¶ 110-14.

The United Nations Working Group on Arbitrary Detention, which the United Nations created to investigate violations of Article 9 of the Covenant on Civil and Political Rights and other cases of detention that violate international law, reached a similar conclusion. In its consideration of the detention of immigrants, it stated that a "maximum period [of detention] should be set by law and the custody may in no case be unlimited or of excessive length." *See* Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2000/4, at principle 7 (Dec. 28, 1999); *accord* Report on the Visit of the Working Group to the United Kingdom on the Issue of Immigrants and Asylum Seekers, U.N. Doc. E/CN.4/1999/63/Add.3 (Dec. 18, 1998); *see also Ferrer-Mazorra v. United States*, Inter-American Commission on Human Rights, Rep. No. 51/01, Case 9903, at ¶ 177 (Apr. 4, 2001) ("[S]tates have historically been afforded considerable discretion under international law to control the entry of aliens into their territory. This does not mean, however, that this discretion need not

be exercised in conformity with states' international human rights obligations.")

Indeed, the Working Group on Arbitrary Detention addressed the issue of arbitrary detention of immigrants by the United States in one case, and condemned the practice as a violation of Article 9 of the Covenant on Civil and Political Rights. *See* Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Report of the Working Group on Arbitrary Detention, Addendum, Decisions and Opinions Adopted by the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998.44.Add.1 (Nov. 3, 1998) (considering allegations, unchallenged by the United States, of three Cuban nationals who claimed to have been detained by the United States because of their nationality).

Section 1231(a)(6) also fails to provide the detainee with meaningful judicial review of the lawfulness of detention and therefore violates U.S. obligations under international law. In ensuring compliance with Article 9(4), the Human Rights Committee has consistently held that detainees must have periodic access to a court with the power to decide upon the legality of the detention. In *Torres v. Finland*, Communication No. 291/88 (Apr. 2 1990), the Human Rights Committee found that review of the lawfulness of detention by a Ministry official failed to meet Finland's obligations under Article 9(4). In reaching its finding, the Committee emphasized that Article 9(4) required review by a court "so as to ensure a higher degree of objectivity and independence." *Id.* at ¶ 7.2. In the case of *A v. Australia*, the Committee stressed that court review "must include the possibility of ordering release." *Id.* at ¶ 9.5.

Here, an inadmissible alien has no access to a court that can review the lawfulness of the detention. An inadmissible alien is entitled only to a limited review by an official, in which the alien bears the burden of proof. *See* 8 C.F.R. § 241.4(d)(1) (2003) (permitting release "if the alien demonstrates to the satisfaction of the Attorney General" that he does not pose a danger to the community or a risk of flight). Moreover, this Court found in *Zadvydas* that special procedural protections are required in all cases of preventive detention on the basis of dangerousness and noted the "obvious" constitutional problem raised by such a lack of procedural protections where a permanent deprivation of liberty may be at stake. *Zadvydas*, 533 U.S. at 691-92. As discussed above, adequate procedural protections are required under international law as well. The prohibition against arbitrary detention applies, in particular, to the continued detention of convicted criminals who have already served the whole of their prison terms. Section 1231(a)(6) provides for the deprivation of liberty after a final order of removal has been granted; the detainee is not awaiting criminal trial or detained as punishment for a crime. The Human Rights Committee has addressed this practice and held that it violates Article 9 of the Covenant on Civil and Political Rights. *Nqalula Mpandanjila v. Zaire,* Communication No. 138/1983 (Mar. 26, 1986), U.N. Doc. Supp. No. 40 (A/41/40) at 121 (1986).

Finally, states are prohibited from infringing the right to liberty without showing reasonable necessity, which the government has not done in this case. The circumstances of Benitez's detention demonstrate this. Benitez is not serving a criminal sentence, and no criminal proceedings are pending against him. Although Benitez is a convicted criminal, he has completed his sentence. Without an

independent court proceeding, any argument by the government that Benitez poses an intolerably high risk of danger to the community cannot be substantiated.[14] Indeed, detention under § 1231(a)(6) is not limited to a class of unusually dangerous people. Rather, it is available for the whole range of aliens who are inadmissible under 8 U.S.C. § 1182 or removable under § 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4), or whom the Attorney General believes unlikely to comply with an order of removal. *See* § 1231(a)(6). As the Human Rights Committee stressed in *A v. Australia*, the broad application, under § 1231(a)(6), of indefinite or prolonged detention violates the international law standard forbidding states to infringe liberty interests absent a showing of necessity.

Under § 1231(a)(6), the government holds immigrants indefinitely, even where they are not serving a criminal sentence, are not awaiting criminal prosecution, do not present a flight risk, and have not been shown to be a danger to the community. These immigrants are unable to obtain judicial review of the detention orders that threaten to deprive them permanently of liberty. Such detention is therefore arbitrary and a violation of international law.

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[14] Neither can the government justify indefinitely detaining Benitez on the basis that he presents a substantial flight risk; as this Court has noted, the risk of flight "is weak or nonexistent where removal seems a remote possibility at best." *Zadvydas*, 533 U.S. at 690.

C. The "Entry Fiction" Provides No Basis for the Violation of Basic Human Rights

The so-called "entry fiction" – the fiction that an inadmissible alien, who in this instance resided in the country for 20 years has never entered the territory of the United States – provides no justification for arbitrary detention. Simply put, international law does not recognize the distinction that U.S. immigration law draws among removable immigrants – the distinction between those who are "deportable" because they have "entered" the United States, *see* 8 U.S.C. § 1227(a), and those who are "inadmissible," *see id.* 8 U.S.C. § 1101(13)(B) & 1182(d)(5).

As Justice Kennedy noted in *Zadvydas*, "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary and capricious." 533 U.S. at 721 (Kennedy, J., dissenting). The international law standards are the same for both groups. *See id.* (citing Report of the United Nations Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999); United Nations High Commissioner for Refugees, Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers (Feb. 10, 1999)). As discussed above, international law asks simply whether a state's detention of an individual is reasonably necessary to accomplish a legitimate purpose, considering all the circumstances. If not, then continued detention is arbitrary and therefore illegal.

It would, indeed, be surprising if international law *did* recognize the distinction between deportable and inadmissible immigrants. While the distinction "runs throughout immigration law," *Zadvydas*, 533 U.S. at 693, it is relevant

only as to the procedures necessary to exclude unwelcome immigrants: the inadmissible may be prevented from entering, while the deportable must be ejected. *Id.* at 703-04 (Scalia, J., dissenting). As to substantive liberty interests, the categories have no meaning. Congress apparently recognized as much when it passed the statutory provision at issue, which itself treats the two categories identically as to detention while awaiting removal. *See* § 1231(a)(6). The two categories, furthermore, do not differ with respect to the factors that may justify prolonged detention in exceptional circumstances. The inadmissible are not, for example, more dangerous than the deportable, or more likely to avoid appearing for future proceedings. They are surely no less human and no less deserving of human rights.

The distinction between inadmissibility and deportability is particularly insubstantial in the case of immigrants, such as Benitez, who have resided in the United States for many years. Inadmissible immigrants include not only parolees, but also, in many cases, permanent legal residents of the United States who left the country, even for a short time, and were then deemed inadmissible when they attempted to return. *See* 8 U.S.C. § 1101(13)(C) (stating conditions under which legal permanent residents attempting to reenter are "seeking admission" to the United States). Many inadmissible immigrants, including Benitez, came to the United States to escape from the oppression of their home states and were welcomed by the government when they arrived. Years later, after having encouraged them to make a life for themselves here, the government may not forfeit their most basic human rights by simply labeling them "inadmissible."

CONCLUSION

Amici urge the Court to read 8 U.S.C. § 1231(a)(6) as limiting an inadmissible alien's detention to a time reasonably necessary to secure his removal, just as the Court held with respect to the detention of deportable aliens under the statute. *Zadvydas*, 533 U.S. at 696-99. In *Zadvydas* the Court held, correctly, that the statutory language of § 1231(a)(6) is ambiguous – that Congress did not express a clear "intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed." *Id.* at 697. The language of the provision does not distinguish inadmissible aliens from deportable aliens. *See* § 1231(a)(6). If the statute is ambiguous with regard to one class of unwelcome aliens, it is ambiguous with regard to both classes. *See Zadvydas*, 533 U.S. at 710-11 (Kennedy, J., dissenting). Statutes should not be interpreted in a manner that places them in conflict with international law unless no other reading is possible. *The Schooner Charming Betsy*, 6 U.S. at 118. To avoid such a conflict, the Court should hold that the implicit reasonableness limitation on the length of detention under § 1231(a)(6) applies to inadmissible, as well as to deportable, immigrants.

For all the above-stated reasons, the Court should reverse the decision of the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, Interim Field Office Director, Miami Office, Bureau of Immigration and Customs Enforcement,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR *AMICI CURIAE* LEGAL AND SERVICE ORGANIZATIONS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
INTRODUCTION	6
STATEMENT OF FACTS	7
Mariel Cubans	8
Other Inadmissible Aliens Subject to Indefinite Detention	14
ARGUMENT	22
I. Indefinite detention results in extreme mental, physical, and emotional hardship to detainees, including persons fleeing persecution abroad and others in positions of great vulnerability.	23
II. Detainees' freedom is left to the caprices of arbitrary and cursory procedures of review.	26
III. Indefinite detention of Mariel Cubans and other inadmissible aliens results in extreme hardship to productive members of society, their communities, and their family members, including U.S. citizens and permanent residents.	28
CONCLUSION	30

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Page

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8 U.S.C. § 1231(a)(6) (2000) 7

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Page

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Page

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Page

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INTEREST OF AMICI CURIAE

Amici are organizations that offer various legal and social services to immigrants who arrive at our borders. *Amici* include:[1]

The **Asian American Legal Defense and Education Fund (AALDEF)**, founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through litigation, legal advocacy and dissemination of public information. AALDEF has represented and assisted many Asian Americans on immigration matters. Every American, other than Native Americans, is an immigrant; the treatment of the Mariel Cubans affects all Americans.

The **Capital Area Immigrants' Rights Coalition (CAIR Coalition)** provides services to the immigrant advocacy community in the greater Washington, D.C. area. CAIR Coalition brings together community groups, *pro bono* attorneys, volunteers and immigrants to work for a fair and humane immigration policy. CAIR Coalition monthly visits approximately 500 immigrants detained by the Department of Homeland Security.

The **Catholic Legal Immigration Network, Inc. (CLINIC)** represents one expression of the Catholic Church's commitment to full membership of migrants in their chosen society. CLINIC supports 155 community-based legal agencies serving low-income immigrants and newcomers. CLINIC and its member agencies serve the most vulnerable migrants, such as refugees, asylum seekers, detainees, families in need of reunification, laborers abused in the workplace, victims of domestic violence and survivors of human trafficking. CLINIC operates the largest *pro bono* detention representation project in the country representing DHS detainees in eight sites. It also

1. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *Amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *Amici* or their counsel, made a monetary contribution to the preparation or submission of this brief.

runs the nation's largest *pro bono* immigration appeals project which focuses on primarily representing people detained by DHS. For the last seven years, CLINIC has administered a special program that provides legal support and representation to indefinitely detained immigrants, including the "Mariel" Cubans. CLINIC has extensive experience in representing people subject to DHS' post order custody review process.

The **Center for Constitutional Rights (CCR)** is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. Founded in 1966 during the Civil Rights Movement, CCR has a long history of litigating cases on behalf of non-citizens seeking to assure them of due process.

The **Coalition for the Human Rights of Immigrants (CHRI)** is an all-volunteer organization that supports the rights of immigrants through grassroots education and action. A large part of CHRI's recent work has concerned immigrant detention. CHRI has worked closely with detainees, their families, and other advocates to bring about change in the policy of indefinitely detaining non-residents for whom deportation is impossible or unforeseeable.

The **Florence Immigrant and Refugee Rights Project** is a non-profit organization that provides free legal assistance to men, women and children who are detained by the Bureau of Immigration and Customs Enforcement in Arizona. The Florence Project's nationally commended model for providing legal services includes information and orientation for all those detained and targeted follow-up services, including representation, *pro bono* referral and intensive *pro se* case assistance, to ensure that all detained individuals receive at least a minimum level of legal services as they go through removal proceedings. Founded in 1989, the Project currently serves the 1,900 immigrants detained on any given day in Arizona.

The **Hebrew Immigrant Aid Society (HIAS)** is America's oldest international migration and refugee resettlement agency.

HIAS is dedicated to assisting persecuted people worldwide and delivering them to countries of safe haven. In its 120 years of existence, HIAS has rescued more than 4.5 million people. HIAS oversees the resettlement of refugees in the United States through a network of Jewish communal agencies. HIAS also provides direct immigration legal services in the New York metropolitan area to detained asylum seekers and immigrants. HIAS is concerned that indefinite detention of inadmissible aliens will adversely affect asylees, refugees, asylum seekers, and parolees.

Immigration and Refugee Services of America (IRSA) is a non-profit, nongovernmental organization that has served refugees and immigrants since 1911. The U.S. Committee for Refugees (USCR) is a public information and advocacy program of IRSA. Since 1958, USCR has defended the rights of refugees, asylum seekers, and internally displaced persons worldwide.

The **Lawyers' Committee for Civil Rights Under Law of Texas (Texas Lawyers' Committee)** is part of a national network of non-partisan, non-profit offices founded in 1963 at the request of President John F. Kennedy to provide legal services to victims of discrimination. The Texas Lawyers' Committee, founded in 1991, is committed to attaining and preserving civil rights for immigrants and refugees by engaging in impact litigation and advocacy.

Minnesota Advocates for Human Rights conducts a broad range of innovative programs to promote human rights, including investigative fact finding, direct legal representation, education and training, and publication. Minnesota Advocates has produced more than 50 reports documenting human rights practices in more than 20 countries; educated more than 10,000 students and community members on human rights issues; and provided legal representation and assistance to more than 3,000 disadvantaged individuals and families. Minnesota Advocates is the recipient of the 1991 AILA Human Rights Award and of the 2003 Berger Award from the National Immigration Project of the National Lawyers Guild. The Refugee and Asylum Project

recruits and trains volunteer attorneys, paralegals, and law students to represent individuals who have fled persecution.

The **National Association of Criminal Defense Lawyers (NACDL)** is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in 50 states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives, NACDL files approximately 35 *amicus curiae* briefs a year, including at least ten *amicus curiae* briefs in the U.S. Supreme Court, on a variety of criminal justice issues.

The **National Immigration Law Center (NILC)** is a non-profit legal support center dedicated to protecting and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, and provides technical assistance to non-profit legal assistance organizations across the country concerning immigrants' rights. NILC also conducts litigation to promote the rights of low-income immigrants in the areas of immigration law, employment, and public benefits. A major concern of the organization is to ensure the fairness and constitutionality of immigration law implementation. NILC has a direct interest in the issues in this case.

The **Northwest Immigrant Rights Project (NWIRP)**, founded in 1984, is a private, non-profit organization committed to defending and advancing the rights of immigrants and refugees. NWIRP provides direct legal services to immigrants, including representation to immigrant survivors of domestic violence, asylum seekers, family visa and naturalization

applicants, and those in removal proceedings. NWIRP is also involved in special projects that benefit large classes of immigrants and engages in public policy advocacy. NWIRP provides both direct representation and *pro bono* referral of cases involving detained non-citizens who are deemed inadmissible. As a legal services organization, Northwest Immigrant Rights Project has a vested interest in ensuring that the rights and basic freedoms of our clients are safeguarded under the law.

The **Political Asylum Project of Austin (PAPA)** is a non-profit organization offering free and low-cost immigration services to low-income individuals in Central Texas. PAPA's services include representation of long-term detainees seeking release from custody, including Mariel Cubans. PAPA has observed scores of Mariel Cubans with final orders of removal remain indefinitely detained in Central Texas and separated from their families for as long as eight years. PAPA is dedicated to ensuring due process and justice for all indefinite detainees.

The **World Organization Against Torture USA (WOAT)** is the U.S. affiliate of a worldwide network of more than 200 human rights organizations dedicated to the prevention of torture and other major human rights abuses, with each affiliate focusing primarily on human rights compliance in its own country. WOAT works extensively on refugee cases and issues, providing direct legal assistance in a select number of cases raising the most significant issues, as well as legal support and information clearinghouse services, with an emphasis on gender-based abuse and torture-related concerns. Many of those we have assisted who are seeking refuge from torture and persecution in the United States have faced long-term indefinite detention.

INTRODUCTION

Daniel Benitez has been imprisoned since October 2001 under an immigration detention scheme that affects countless aliens who arrive at our borders seeking freedom and security.[2] Many of these aliens are refugees and asylum seekers fleeing persecution and oppressive regimes. Instead of finding freedom, these individuals face detention, often in harsh prison conditions, if the United States chooses not to admit them into our country but is unable to remove them to another. Mr. Benitez and other similarly situated individuals can now be detained indefinitely, even when their removal from this country is impossible or unforeseeable and when there is no evidence that their release presents a threat to society or to national security. This limbo can last for years, even decades, and exacts severe emotional, physical, and mental hardship on detainees and their families.

This Court has held that such detention of *admitted* aliens raises constitutional concerns of such magnitude that a presumptive limit on their detention must be read into the authorizing statute.[3] The damage to liberty and fairness

2. The Department of Homeland Security (DHS), in its official compilation of immigration statistics, does not provide numbers of inadmissible aliens who cannot be deported and are held in detention after the 90-day post-final-deportation-order removal period. *See* U.S. Dep't of Homeland Security, *Yearbook of Immigration Statistics* (2002). The *Washington Post* has reported that 2,269 inadmissible aliens are currently held in immigration custody, more than half of whom have been held for more than six months. Charles Lane, *High Court to Consider Detention Case*, Wash. Post, Jan. 17, 2004, at A02. Effective March 1, 2003, the responsibilities of the Immigration and Naturalization Service (INS) were transferred to DHS. Responsibility for the enforcement of immigration laws now rests with the Bureau of Immigration and Customs Enforcement. This brief will continue to refer to INS, because most of the events it describes took place before the transfer of authority.

3. *Zadvydas v. Davis*, 533 U.S. 678 (2001) (interpreting 8 U.S.C. § 1231(a)(6)).

recognized by this Court in *Zadvydas* when legal permanent residents convicted of aggravated felonies are indefinitely detained is at least as troubling when Mariel Cubans and other aliens arriving at our borders, many of whom have never been convicted of a crime, are indefinitely detained. When there is no legal or practical possibility for removal, and when existing custody review procedures fail basic standards of fairness and accountability, the indefinite detention of non-admitted aliens is a practice inimical to fundamental values that shape and anchor our society.[4]

STATEMENT OF FACTS

Under the government's interpretation of 8 U.S.C. § 1231(a)(6) (2000), many individuals like Mr. Benitez face indefinite detention in prisons, jails, and detention centers across the country, because final deportation orders against them cannot be carried out in the foreseeable future. Those affected by this form of indefinite detention include asylum seekers fleeing oppressive regimes in their home countries and "inadmissible" aliens who have lived productively in our society for many years. Most of the individuals affected left situations of extreme social and political vulnerability to come to the United States. The unpredictability of the form, conditions, and review of their detention ensures that they remain vulnerable for as long as they live in this country. Their continued detention profoundly disrupts the lives of their spouses, children, and other family members, including U.S. citizens and permanent residents.

The petitioner in this case, Daniel Benitez, arrived as part of the "Mariel Boatlift," or "Freedom Flotilla," which was a singular episode in the history of this country's legal and political response to immigration. As documented in other filings before this Court, between 125,000 and 150,000 Cuban citizens

4. "[F]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (invalidating a state statutory scheme permitting commitment to a mental institution of a defendant acquitted for reason of insanity without a showing of mental illness).

journeyed to the United States when, between April and October 1980, Fidel Castro opened the port city of Mariel to those wishing to leave Cuba.[5] President Carter made a number of widely publicized statements welcoming these "Mariel Cubans" as refugees, and a special entry status was created for them as a step toward attaining permanent residence.[6]

Mariel Cubans constitute the most visible group of aliens affected by the policy of indefinite detention, because of their numbers, the extensive press coverage of their arrival, and Cuba's continuing refusal to accept those who have been ordered removed from the United States. However, Mariel Cubans are not the only group subjected to this indefinite detention scheme; the policy also affects other immigrants and asylum seekers who cannot be returned to their countries of origin.

Some of the individuals profiled below have never committed a crime. Others have been detained by the INS for periods far longer than the criminal sentences they served, in many cases for minor offenses. Many Mariel Cubans convicted of crimes served their sentences long ago, yet remain in detention, considered never to have entered the country that welcomed them and that has been their only home for 23 years. All of the individuals subjected to this detention policy have been imprisoned, often with dangerous criminal populations, with their only hope of release a review procedure that has been repeatedly found arbitrary and cursory.

Mariel Cubans

Xiomara Gonzalez has lived continuously in the United States since 1980, along with her daughter, who is a U.S. citizen, and her mother, a U.S. permanent resident.[7] Ms. Gonzalez is

5. *E.g.*, Brief for *Amici Curiae* Florida Immigrant Advocacy Center.

6. *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 896-899 (N.D. Ga. 1985).

7. Brian Donohue, *A Boatlift to Freedom, A Life Behind Bars*, N.J. Star-Ledger, Oct. 22, 2003, at 1.

the grandmother of three U.S. citizen children.[8] The INS detained her after she completed a prison sentence for a drug possession conviction. A U.S. district court judge ordered her release from indefinite detention only after a newspaper reported on the failed review process that kept her in INS custody for more than a year after completion of her sentence.

Ms. Gonzalez fled Cuba and arrived in the United States on June 21, 1980. She served a one-year sentence for a 1987 drug conviction. In 1995, her parole was revoked after she was convicted of a drug possession charge.[9] She studied for and received her high school equivalency diploma during her incarceration.[10] Upon her release from state custody, the INS detained Ms. Gonzalez at the Hudson County Correctional Center in New Jersey, and she was ordered removed on July 26, 2002.[11] Ms. Gonzalez submitted multiple requests for parole to the Cuban Review Panel,[12] but received no

8. Telephone Interview by Kevin Kish with Xiomara Gonzalez (February 19, 2004).

9. *Gonzalez v. Ashcroft*, 278 F. Supp. 2d 402, 404 (2003).

10. Brian Donohue, *Judge Frees Woman Caught in Legal Limbo as Mariel Boatlift Felon*, N.J. Star-Ledger, Oct. 24, 2003, at 15.

11. *Gonzalez*, 278 F. Supp. 2d at 405.

12. This review is mandated by law. 8 C.F.R. § 212.12 (2001). Parole determinations and revocations respecting Mariel Cubans. Also known as the "Cuban Review Plan," this statute governs the granting or withholding of parole for Mariel Cubans in custody.

> The Plan provides that each detainee will be evaluated by a Cuban Review Panel, comprised of two members of the INS professional staff. In order to recommend that a particular detainee be paroled, the panel members must conclude that he or she is presently non-violent, is likely to remain non-violent, and is not otherwise likely to violate any parole conditions in the event of his or her release.

(Cont'd)

response.[13] After thirteen months, she filed a petition for a writ of *habeas corpus* in federal court. The district court denied her petition, holding that, as an inadmissible alien, she was not entitled to *Zadvydas* protections. Nevertheless, the court expressly ordered the Cuban Review Panel to provide the required custody review within 30 days of the decision.[14]

Despite the court's unambiguous order, Ms. Gonzalez did not receive any response from the INS. One month after the court-ordered deadline for review, a newspaper reporter profiled her plight.[15] In an emergency hearing the next day, the district court found that the INS's continued failure to review her detention impermissibly compromised Ms. Gonzalez's due process rights and ordered her immediate release.[16]

(Cont'd)

> The Plan also provides a list of seven, apparently non-exclusive factors to guide the Panel in reaching its determinations. If the Panel cannot recommend parole based solely on the detainee's paper record, the Panel must interview the detainee. Although the detainee may be 'accompanied' by a person of his choice at the interview, he has no right to counsel provided by the government, and no apparent right to review his record, cross-examine government witnesses, or call witnesses on his own behalf. The interview, in short, is not an adversarial proceeding.

Chavez-Rivas v. Olson, 207 F. Supp. 2d 326, 329 (D.N.J. 2002) (internal citations omitted).

13. The Panel had evidently performed a custody review and decided to detain Ms. Gonzalez, but she was never notified of this decision and consequently had no ability to appeal it. *Gonzalez*, 278 F. Supp. 2d at 405.

14. *Id.*

15. Donohue, *A Boatlift to Freedom, A Life Behind Bars, supra.*

16. Donohue, *Judge Frees Woman Caught in Legal Limbo as Mariel Boatlift Felon, supra.*

Ms. Gonzalez had received no notification of parole review during nearly 16 months of detention, despite explicit statutory obligations and a judicial order that such review be conducted. At the emergency hearing, the government claimed that a decision had been made to release Ms. Gonzalez, but that this recommendation was being reviewed by officials at headquarters in Washington.[17] In explaining the delay, the government stated: "[A]pparently the importance and urgency of it was not made clear to headquarters."[18]

Omar Rodriguez-Alonso, a Mariel Cuban, spent nearly twenty years in INS detention. In the early 1980s, he served a short period on probation and in prison for burglary and marijuana possession charges.[19] Following a 120-day sentence for possession of marijuana in 1984, the INS detained him. He was 30 years old. When he was finally released in 2003, he was 49. Mr. Rodriguez-Alonso currently lives in Los Angeles and helps other newly paroled Mariel Cubans resettle and integrate successfully into the community.[20]

Mr. Rodriguez-Alonso arrived in the United States in 1980. Upon completion of a 120-day sentence for marijuana possession, the INS detained him, and he received a final deportation order in 1987. Fourteen years later, the Cuban

17. 8 C.F.R. § 212.12 grants ultimate discretionary authority for granting parole to an Associate Commissioner for Enforcement at INS headquarters in Washington, D.C. The Washington, D.C. office may refuse to grant parole to a detainee for any reason, even when a review panel has recommended release. 8 C.F.R. § 212.12(e).

18. Transcript of Proceedings, *Gonzalez v. Ashcroft*, Civ. No. 03-2290, at 5 (D.N.J. Oct. 23, 2003); Donohue, *Judge Frees Woman Caught in Legal Limbo as Mariel Boatlift Felon, supra.*

19. Government's Response to Court's November 18, 2002 Order, *Omar Rodriguez Alonso v. Al Herrera*, No. 02-CV-8041-TJH (MAN) (C.D. Cal. Jan. 9, 2003).

20. Mark Dow, *American Gulag: Inside U.S. Immigration Prisons*, Berkeley: University of California Press (forthcoming June 2004).

Review Panel recommended parole for Mr. Rodriguez-Alonso.[21] The panel spoke highly of Mr. Rodriguez-Alonso:

> [He] seems to be very intelligent. He speaks three languages. . . . His criminal history appears non-violent. He presented a letter of support from a church group in Virginia. The panel feels that, if given the opportunity, [he] would do well if released to a halfway house again.

Despite the Panel's positive recommendation, Mr. Rodriguez-Alonso's parole was rejected by the Washington head office of the INS.[22] The INS again denied his parole in 2003, citing only nineteen-year-old criminal charges (charges that had been previously deemed "non-violent") and a report of a non-violent infraction in the facility where he was being detained; the INS asserted that it was not "clearly evident" that Mr. Rodriguez-Alonso was likely to remain non-violent if released into a halfway house.[23]

Unless *Zadvydas* protection is extended to inadmissible aliens, other individuals who threaten no harm to our society will be subjected to the caprices of the review system that deprived Mr. Rodriguez-Alonso of nearly twenty years of freedom.

Valentin Chavez-Rivas' long-term detention also resulted from the arbitrariness of the Cuban Review Panel process. A U.S. district court found the process so arbitrary that it ordered his release. Like thousands of other Mariel Cubans, Mr. Chavez-

21. Cuban Review Summary Sheet, Rodriguez-Alonso (Nov. 1, 2001).

22. Final Notice of Parole Review, Rodriguez-Alonso, Cuban Review Plan, United States Department of Justice Immigration and Naturalization Service (Washington, D.C. Nov. 28, 2001).

23. Final Notice of Parole Review, Rodriguez-Alonso, Cuban Review Plan, United States Department of Justice Immigration and Naturalization Service (Washington, D.C. Oct. 6, 2003).

Rivas came to the United States in 1980 in search of a better life. The INS detained him upon arrival, but soon paroled him into the country. Mr. Chavez-Rivas completed sentences for three drug convictions. After serving three years for his last conviction, he was released in 1998 and detained by the INS. The INS reviewed his detention, pursuant to the Cuban Review Plan, in 1999, 2000, 2001, and 2002,[24] but denied parole each time. A federal district court heard Mr. Chavez-Rivas' *habeas* petition in June 2002 – more than four years after the INS took him into custody – and highlighted the inadequacies of the review process:

> In 1999 and 2000, the Panel's written explanation for each denial of parole relied in part on the fact that Chavez-Rivas had been arrested on a number of charges that were later dismissed, or for which no disposition was known. The record before me contains no explanation for the Panel's denial of parole in 2001 or 2002.[25]

The District Court found that in four reviews over a period of more than four years, Mr. Chavez-Rivas had never received a fair parole hearing. Instead, the INS repeatedly and summarily denied parole without inquiring into whether he was likely to remain non-violent, pose a threat to the community, or violate the terms of his parole – the inquiry mandated by statute.[26]

Mr. Chavez-Rivas had the good fortune to obtain counsel to file a *habeas* petition on his behalf and have his indefinite detention examined by a federal district court. But most in his situation lack the language skills, access to information, and knowledge to secure counsel. Without a finding from this Court that the *Zadvydas* presumption against indefinite detention

24. 8 C.F.R. § 212.12.

25. *Chavez-Rivas*, 207 F. Supp. 2d at 329.

26. 8 C.F.R. § 212.12(d)(2).

applies to inadmissible aliens stopped at the border, people in Mr. Chavez-Rivas' position will remain in indefinite INS detention with no reasonable expectation of a fair review or the restoration of their freedom.

Other Inadmissible Aliens Subject to Indefinite Detention

Ali Fekaouni is an Algerian citizen with no criminal history who was detained by the INS for two and a half years. Mr. Fekaouni arrived in the United States on June 25, 2000 and requested to be paroled into the country due to political turmoil in Algeria.[27] INS officials took him into custody, determining that he was inadmissible because he did not possess proper entry or travel documents. Mr. Fekaouni's application for asylum was denied, and his removal order became final on January 31, 2001.[28] The INS detained him for two and a half years while unsuccessfully trying to deport him.

Mr. Fekaouni fully cooperated with the INS to facilitate his deportation. From the summer of 2001 to the summer of 2002, he voluntarily participated in interviews with the Algerian Consulate, which, on three separate occasions, refused to issue travel documents because he lacked identification.[29] Mr. Fekaouni tried to contact his father in France to obtain a birth certificate, but never received a response. He requested travel documents from other countries, including France, Tunisia, and Morocco, but received no responses.[30]

Mr. Fekaouni, transferred at least seven times during his detention, said: "They don't tell me nothing. I don't know where

27. Report and Recommendation, *Fekaouni v. INS, et al.*, Civ. No. C02-1834-RSM (MJP) (W.D. Wash. Jan. 24, 2003).

28. *Id.*

29. *Id.*

30. *Id.*

I am going or why I am going, I don't know nothing."[31] He described his months confined at the INS-contracted Correctional Services Corporation detention facility in Seattle: "In one room, they put sometimes 20 people, sometimes 25 people, from all different places. You can't have privacy, you can't have no space."[32]

In May 2001, Mr. Fekaouni was able to communicate with a lawyer after receiving her contact information from prisoners at the city jail where he was being held.[33] Until then, he said, he had been ignorant of INS procedures and of his rights.[34] Mr. Fekaouni's lawyer filed a petition for a writ of *habeas corpus*, which the district court granted, finding that the detention of inadmissible aliens more than six months after the 90-day post-deportation-order removal period violated *Zadvydas* and *Xi v. Ashcroft*, 198 F.3d 382 (9th Cir. 2002).[35] Mr. Fekaouni was finally released from detention in February 2003. Since his release, he has settled in Tacoma, Washington, where he has a steady job at a landscaping company.[36]

The INS detained Mr. Fekaouni for nearly two years after the 90-day removal period following his final order of

31. Telephone Interview by Eunice Lee with Ali Fekaouni (Feb. 18, 2004).

32. *Id.*

33. *Id.*

34. *Id.*

35. Order Granting Petition For Writ of *Habeas Corpus*, *Fekaouni v. INS, et al.*, Civ. No. C02-1834-RSM (MJP) (W.D. Wash. Jan. 24, 2003). The government appealed the district court decision; however, this appeal was dismissed in September 2002 due to the appellant's failure to respond to a court order to show cause why the district court judgment should not be summarily affirmed. *See* Order, *Fekaouni v. INS, et al.*, No. 03-35348 (9th Cir. August 27, 2003).

36. Telephone Interview by Eunice Lee with Ali Fekaouni (Feb. 18, 2004).

deportation. Mr. Fekaouni cooperated with the INS, had no criminal record, and was never determined to be a danger to the community. He said, "I don't know what happened to me. I didn't commit any crime. Every day, I wonder about what was happening. I think maybe they keep me here for my life. I don't have a chance to get out."[37] Had he not been transferred to a jail where fellow prisoners pointed him to a lawyer, and were it not for the Ninth Circuit ruling in *Xi* that inadmissible aliens must benefit from *Zadvydas* protection, Mr. Fekaouni might still be languishing in jail. Unless this Court finds that *Zadvydas* protections apply to inadmissible aliens, other innocent people like Mr. Fekaouni risk indefinite detention even though there is no reasonably foreseeable possibility that they will be deported.

Xue Wan Yun, a native and citizen of China, was taken into custody upon his arrival at Detroit Metro Airport on November 9, 2001 and held in INS detention for 18 months.[38] He stated that he wanted to apply for asylum, but was ordered deported and chose not to contest that order. Mr. Yun tried to cooperate with INS efforts to deport him. With an elderly, ailing mother and a young daughter in China, he wrote several letters to the Detroit District Office of the INS, expressing his wish to return to China as soon as possible. He received no response.[39] In July 2002, a month after authority over his custody status was transferred to the INS Headquarters Post-Order Detention Unit (HQPDU), his status was finally reviewed. The INS determined that Mr. Yun was not a danger to the community, but nevertheless ordered his continued detention, finding that he was a flight risk despite his expressed desire to return to China and his decision not to appeal his deportation order.[40]

37. *Id.*

38. Petition for Writ of Habeas Corpus, *Yun v. Ashcroft*, Case No. 03-CV-70253 (E.D. Mich. Jan. 22, 2003).

39. *Id.*

40. *Id.*

Mr. Yun secured counsel and wrote letters asking the HQPDU to clarify his removal delay and to make a new custody determination. He provided a letter of support from a family friend in New York who was willing to house Mr. Yun until his removal. The HQPDU never responded to his requests. In her October 25, 2002, response to a letter of inquiry from U.S. Senator Carl Levin, the district director stated that "a travel document has been applied for. As soon as a passport is received from the Chinese government, travel arrangements will be made and he [Mr. Yun] will thereafter be flying to China."[41] Eight months after that assertion, Mr. Yun remained in INS custody.

Mr. Yun's lawyer finally sought *habeas* relief, which was granted in April 2003. The government appealed the district court's decision, but the court of appeals stayed briefing in the case pending a ruling in *Benitez v. Mata*.[42] While Mr. Yun was released after 18 months' detention, his continued freedom now depends on the outcome of the present case. Unless this Court extends *Zadvydas* protections to inadmissible aliens, Mr. Yun and other individuals who have committed no crimes and pose no threat to our society will live with the persistent threat of having their freedom indefinitely deprived.

Chi Thon Ngo, who fled hardship and oppression in his native Vietnam, was paroled into the United States in 1982 during the time of a massive outflow of refugees from Vietnam. Convicted of state criminal charges in 1989, he was sentenced to four to six years in prison. In 1995, the state found Mr. Ngo suitable for release into the community and released him on parole.[43] The INS immediately took him into custody and began exclusion proceedings against him. Mr. Ngo received a final

41. *Id.*

42. Order, *Yun v. Ashcroft*, Case No. 03-1744 (6th Cir. Dec. 16, 2003).

43. "The record does not disclose exactly when petitioner came into INS custody, but it appears to have been around the middle of 1995." *Chi Thon Ngo v. INS*, 192 F.3d 390, 392 (3rd Cir. 1999).

exclusion order on July 6, 1995.[44] His removal could not be effectuated, however, because "the governments of Vietnam, Laos and Cambodia have refused to repatriate citizens who have been ordered to be deported from the United States."[45] Mr. Ngo was detained in county jails in Pennsylvania and later transferred to an INS detention facility in New Orleans.[46] Only after four years, when Mr. Ngo was able to secure *habeas* relief from a federal court, was he released from INS detention. The Third Circuit Court of Appeals, in upholding the district court's grant of *habeas*, described the lack of due process afforded to Mr. Ngo:

> [T]he petitioner in this case was repeatedly denied parole by INS officials based on no more than a reading of his file that listed years-old convictions. . . . The INS made no effort to determine if such conduct was presently likely to be repeated or whether it could be discouraged by requiring appropriate surety. Through at least four denials of parole, the INS continued to cite to the petitioner's now nearly ten-year old convictions as justification to confine him.
>
> We do not suggest that these convictions are no longer relevant. Due process is not satisfied, however, by rubber-stamp denials based on temporally distant offenses. The process due even to deportable and excludable aliens requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight.[47]

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44. *Id.*

45. *Id.* at 395.

46. *Id.*

47. *Id.* at 398.

Over the course of four years, after cursory review of Mr. Ngo's record and without a meaningful inquiry as to whether he would pose a flight risk or a danger to the community, the INS had repeatedly and summarily denied him parole. Mr. Ngo lost years of his life in unnecessary detention after the state found him suitable for release into the community. Absent a ruling from this Court that *Zadvydas* protections apply to them, other inadmissible aliens with no foreseeable possibility of deportation will risk lengthy or even permanent detention on the basis of cursory INS review and arbitrary denial of parole.

Zaki Mohammad Saleh, a citizen of Iraq and a member of the Turkmen ethnic minority in that country, personally experienced the horrors of Saddam Hussein's regime. He escaped to Turkey and made his way to the United States in April 2002 to seek asylum.[48] He has been in custody ever since, imprisoned with criminals, with neither freedom nor deportation in his foreseeable future.

The Iraqi government executed Mr. Saleh's father for political dissent in 1974, and Mr. Saleh was compelled to join Saddam Hussein's army in 1983. He served until 1991, when, in an effort to avoid battle with U.S. troops in Operation Desert Storm, he shot himself in the shoulder. Iraqi Secret Service guards tortured Mr. Saleh by applying electric shocks and repeatedly raping him to make him confess to shooting himself. After he confessed, he was sentenced to death by firing squad,[49] but fled to Turkey, where he was granted a temporary residency permit.[50] His entire family ultimately fled Iraq to Turkey and Germany.[51]

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48. INS Form I-589, Application for Asylum and for Withholding of Removal. Appendix at 13a.

49. *Id.*

50. Letter from United Nations High Commissioner for Refugees to Lisa Ramirez, Attorney, Catholic Charities of Orange County, Inc. (Oct. 9, 2002). Appendix at 1a.

51. Telephone Interview by Mary J. Hahn with Lisa Ramirez (Feb. 11, 2004).

Mr. Saleh's asylum claim was denied based on a determination that he had resettled in Turkey since fleeing Iraq, and he was ordered removed to Turkey.[52] Turkish immigration law, however, does not allow for the return of non-European asylum-seekers and refugees.[53] Iraq has no procedure for receiving asylum seekers and others deported from the United States.[54] Mr. Saleh waived further appeal of his asylum determination, hoping to be deported or released from the detention in which he had been held since his arrival in the United States.

At the end of the 90-day post-removal-order detention period, the INS denied Mr. Saleh parole, citing his alleged failure to provide biographical information.[55] He immediately wrote to his lawyer:

> I'm told I refused to cooperate giving some information about myself. I don't understand the letter or what they want. I need your help please. I want to cooperate so I can get out of custody. My English is not good and I don't understand what I need to do.[56]

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52. Order of the Immigration Judge in the Matter of Saleh, Case No: A 77-998-654 (Dec. 17, 2002).

53. Letter from United Nations High Commissioner for Refugees to Lisa Ramirez, Attorney, Catholic Charities of Orange County, Inc. (Oct. 9, 2002), appendix at 1a; Letter from United Nations High Commissioner for Refugees to Lisa Ramirez, Attorney, Catholic Charities of Orange County, Inc. (Oct. 21, 2002), appendix at 3a.

54. Letter from Lisa Ramirez, Attorney, Catholic Charities of Orange County, Inc. to Officer Robert Naranjo, Headquarters Post Decision Unit (July 3, 2003). Appendix at 5a.

55. INS Notice of Failure to Comply Pursuant to 8 CFR § 241.4(g) (Mar. 14, 2003). Appendix at 8a.

56. Letter from Zaki Saleh to Lisa Ramirez, Attorney, Catholic Charities of Orange County, Inc. (Apr. 7, 2003). Appendix at 10a.

Mr. Saleh wrote to his family and ultimately obtained an Iraqi identification document by October 7, 2002.[57] A permanent resident has been willing since at least August 2002 to sponsor Mr. Saleh and assure his appearance at court dates,[58] and Mr. Saleh has never been considered dangerous to the community. Nevertheless, he has been detained eleven months beyond the 90-day removal period following his final order of deportation.

In October 2003, Mr. Saleh was moved to a detention facility in Las Vegas for long-term detainees, where he is housed in a cellblock with convicted criminals. He has communicated to his lawyer his urgent concern for his physical safety:

> [I] fear for my safety at this facility. There is a lot of arguing and fighting taking place here. I am an I.N.S. inmate (non-criminal), and I am being housed in a block full of criminals. I do not feel safe here. . . .[59]

Turkey's unequivocal refusal to accept his return has exacerbated Mr. Saleh's sense of hopelessness. Without a ruling that *Zadvydas* protections must be extended to inadmissible aliens, Mr. Saleh faces continued detention among convicted criminals, with no foreseeable hope of release.

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57. Letter from Lisa Ramirez, Attorney, Catholic Charities of Orange County, Inc. to Officer Robert Naranjo, Headquarters Post Decision Unit (July 3, 2003). Appendix at 5a.

58. *Id.*

59. Letter from Zaki Saleh to Lisa Ramirez, Attorney, Catholic Charities of Orange County, Inc. (Oct. 28, 2003). Appendix at 11a.

ARGUMENT

The individuals profiled in this brief fled oppressive countries, but have been subjected to harsh conditions of detention here, often mixed in with the general criminal population. They have been imprisoned pending removal, yet their removal is impossible or unforeseeable. The length of their continued detention is out of their control, even when they make their best efforts to cooperate in their own deportation; indeed, the government suggests that 8 U.S.C. § 1231(a)(6) authorizes their indefinite detention on the basis of their status as inadmissible aliens alone.[60] Federal district courts have found repeatedly that existing administrative parole review procedures are woefully inadequate and arbitrary. Under the Eleventh Circuit's ruling, individuals who have not committed any crimes or administrative infractions in detention during removal proceedings, the 90-day statutory post-removal period, and the six-month period established in *Zadvydas* can still be held indefinitely as a matter of discretion, despite no showing by the government that their release would endanger society or that they pose a risk of flight.

The unreliability of the review process, coupled with the difficulty detainees have in obtaining counsel to adequately raise their claims, results in the continued detention of individuals who pose no threat to society and who have no other hope for freedom. In addition to the privation suffered by the detainees themselves, their detention exacts severe penalties on families and communities. Extending *Zadvydas* protection to such individuals would correct systemic deficiencies in current parole review processes by requiring the government to present evidence of foreseeable removal

60. *See* Opp. Cert. Brief at 4-5.

or dangerousness in order to prolong the detention of inadmissible aliens who cannot be deported.

I. Indefinite detention results in extreme mental, physical, and emotional hardship to detainees, including persons fleeing persecution abroad and others in positions of great vulnerability.

When detention of an inadmissible alien cannot be justified by foreseeable deportation or a finding of dangerousness, continued detention exacts a cruel price. Human Rights Watch reports:

> The stress of months or years in INS detention takes a severe emotional toll on INS detainees. The punitive environment of a jail, the detainees' frequent fear of local inmates, and the uncertainty of when, if ever, they will be released or deported is often too much to bear and has led to depression and suicide attempts.[61]

Alberto Herrera, a Cuban who had never committed a crime in the United States, was detained immediately upon his arrival after the Mariel boatlift. He was kept in prison because he could

61. Human Rights Watch Report, *United States: Locked Away: Immigration Detainees in Jails in the United States*, Vol. 10, No 1(G) (1998), *at* http://www.hrw.org/reports98/us-immig/. *See also* Physicians for Human Rights USA Report, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, (June 2003), *at http://www.phrusa.org/campaigns/asylum_network/detention_execSummary/dr1-toc.html* (hereinafter "PHR Report").

"Eighteen participants (26%) reported thoughts of suicide while in detention. . . . Forty nine (70%) stated that overall their mental health had worsened substantially while in detention." In a 2003 report, Physicians for Human Rights found "extremely high" rates of depression, anxiety, and post-traumatic stress disorder among detained asylum seekers. PHR Report.

not find a sponsor.[62] In despair, he attempted suicide six times between 1983 and 1987. Suicide attempts by other detained Mariel Cubans are regularly reported.[63] One lawyer noted that visiting Mariel Cubans is akin to "visiting people who are buried alive."[64]

Detainees are often confined without normal activities and isolated from their loved ones. Mr. Saleh, for example, has been held in facilities where he could not purchase phone cards that would allow him to contact family members.[65]

This emotional trauma is compounded when INS detainees are forced to share cells with convicted prisoners and live with fear for their physical safety. One detainee, for example, reported that his cellmate, a convicted murderer, had a nightly ritual of sharpening his knife and talking about killing people.[66] Immigration detainees are often subjected to the same treatment as the general prison population.[67] Ali Fekaouni recalled of his detention: "It is a prison, I feel like criminal. They mix me up with criminals and I feel like it even though I never committed

62. His only crimes in Cuba were the unsuccessful thefts of two pounds of goat cheese and two pairs of pants. *See* Mark S. Hamm, *The Abandoned Ones: The Imprisonment and Uprising of the Mariel Boat People* at 60-61, 63 (Boston: Northeastern University Press, 1995). Herrera remained in prison until at least 1995, when this book was published.

63. *Id.* at 88.

64. Sally Sandidge, *On the Road Again*, Atlanta Lawyer (Fourth Quarter 1992), at 9.

65. *See* PHR Report, Ch. V

66. PHR Report, Ch. VII.

67. PHR Report, Ch. VI (describing inadequacies of medical care and practice of transporting detainees in leg shackles and handcuffs); Ch. VII (detailing detainees' experiences in prisons and local jails, including lack of access to outdoors, exercise, fear of prison population).

any crime."[68] Prison guards have also been accused of abusing INS detainees. In 1989, for example, thirteen Asian detainees settled a lawsuit detailing how prison guards ordered inmates to beat INS detainees in what was described as a "staged gladiatorial contest inside the prison."[69]

A particular irony emerges from the indefinite detention of individuals fleeing oppressive regimes abroad. Zaki Mohammad Saleh, a member of a historically persecuted group in Iraq, fled his country for the safety promised by the traditions and policies of the United States. He is being detained in a cellblock with convicted criminals despite the current impossibility of his deportation to Iraq or Turkey, and despite the lack of any evidence to indicate he would present a danger to society. A sponsor is willing to accept responsibility for Mr. Saleh and assure his appearance at future hearings.[70] Mr. Saleh has expressed his desire to provide assistance to immigration officials and has cooperated by obtaining his identification documents. Nevertheless, he has been denied parole for an alleged lack of cooperation.[71]

As with many immigration detainees, Mr. Saleh's anxiety for his future is compounded by his limited ability to understand English, limited access to legal counsel, and fears

68. Telephone Interview by Eunice Lee with Ali Fekaouni (Feb. 18, 2004); *see also* PHR Report (quoting one detainee as stating: "*They don't call it jail, they call it detention. But it is jail. I thought I would be free when I got to America. I came here to find peace and be able to live in peace.*")

69. Chris Hedges, *Suit Details the Beatings of Detainees in Louisiana*, N.Y. Times, Jan. 2, 2001.

70. Letter from Lisa Ramirez, Esq. to Officer Robert Naranjo, July 3, 2003. Appendix at 5a.

71. Letter from Zaki Saleh to Lisa Ramirez, Apr. 7, 2003. Appendix at 10a.

for his physical safety.[72] He has now been detained for nearly a year since the expiration of the 90-day removal period. When the government makes no showing that custody is justified, continued detention imposes unnecessary suffering and betrays the notions of fairness and liberty at the core of our society.

II. Detainees' freedom is left to the caprices of arbitrary and cursory procedures of review.

Court decisions have repeatedly held that parole review proceedings for inadmissible aliens are arbitrary and cursory. Mr. Fekaouni recalls only perfunctory encounters with immigration officers: "When I spoke to them, they give me 2 minutes, 3 minutes. I ask them why are they keeping me, how about my deportation, why do I stay in jail for nothing. They say, wait till next week, wait till next month. They tell me nothing."[73] Xiomara Gonzalez, Xue Wan Yun, Valentin Chavez-Rivas, Chi Thon Ngo, and Ali Fekaouni were released from detention only after federal courts found existing parole review processes to be so deficient as to unacceptably compromise due process rights.

As in the cases of Mr. Ngo and Omar Rodriguez-Alonso, parole denials are often based on nothing more than

72. Human Rights Watch has reported on the stress undergone by non-criminal immigration detainees like Mr. Saleh. *See* Human Rights Watch Report, *United States: Locked Away: Immigration Detainees in Jails in the United States*, *supra*.

> For asylum seekers in local jails, waiting in detention can be psychologically devastating. Post traumatic stress disorders, lack of language skills, ignorance of legal rights, lack of access to lawyers, fear of government authorities, and a criminal environment where they may be housed with convicted criminals all combine to exact special suffering on asylum seekers.

73. Telephone Interview by Eunice Lee with Ali Fekaouni (Feb. 18, 2004).

convictions that date back years, even decades, prior to the parole review.[74] The Third Circuit Court of Appeals characterized such parole reviews as "rubber stamp denials."[75] Valentin Chavez-Rivas was also repeatedly denied parole, twice with no explanation and twice on the basis, in part, of past arrests for charges that were later dropped.

Even where a local parole review panel interviews a detainee, reviews his record, and recommends his release, officials in Washington without any first-hand knowledge about the individual's care can and do reject these recommendations. Omar Rodriguez-Alonso spent an additional two years in detention despite a recommendation of release by the local parole review panel. Similarly, a panel recommendation for Xiomara Gonzalez's release was still being reviewed in Washington a month after a court-ordered deadline for a decision had passed.

Although some detainees have been ordered released by federal courts, *habeas* review of parole determinations is inadequate protection from unjustified detention. Access to courts is contingent upon knowledge of rights, access to libraries and documentation, and, often, assistance of counsel. Human Rights Watch reports:

> [A]ccess to counsel is usually seriously compromised when immigrants are detained by

74. *Chi Thon Ngo v. INS*, 192 F.3d 390 (1999). *See also*, Inter-American Comm. H.R., *Report No. 51/01*, *Case 9903*, *Rafael Ferrer-Mazorra*, *et al.*, (United States), *in* IACHR Annual Report 2000, para. 224. The Inter-American Commission on Human Rights found:

> [C]ertain petitioners have been denied parole based to a significant extent upon their criminal histories, while other petitioners having comparably more serious criminal histories for similar offenses have been released, and the State's descriptions of the cases do not refer to any factors that would appear to justify these petitioners' dissimilar treatment.

75. *Chi Thon Ngo*, 192 F.3d at 398 (3rd Cir. 1999).

> the INS, especially in local jails. Incarceration far from friends and family who can locate and pay for lawyers, frequent transfers from facility to facility, restrictive visitation policies and limited telephone access create significant obstacles to adequate representation.[76]

Without contact with counsel, many detainees remain completely ignorant both of immigration procedures and of applicable law. Mr. Fekaouni secured legal assistance only after other prisoners referred him to an attorney. Many detainees were frequently moved between distant detention facilities, which makes retaining counsel difficult, if not impossible. Mr. Saleh, for example, was moved from Santa Ana, California, to a detention facility in Las Vegas. Often, the INS does not even notify legal counsel when their clients are transferred.[77] The deficiencies of the existing review procedures, combined with the special difficulties encountered by aliens seeking judicial review of those procedures, introduce a level of arbitrariness into the detention system that offends the most basic concepts of justice.

III. Indefinite detention of Mariel Cubans and other inadmissible aliens results in extreme hardship to productive members of society, their communities, and their family members, including U.S. citizens and permanent residents.

Two days after her court-ordered release, Xiomara Gonzalez met two of her three grandchildren for the first time.[78] Ms. Gonzalez now hopes to establish a relationship

76. Human Rights Watch Report, *United States: Locked Away: Immigration Detainees in Jails in the United States*, *supra*.

77. *Id.*

78. Telephone interview by Kevin Kish with Xiomara Gonzalez (Feb. 19, 2004).

with her U.S. citizen grandchildren and to help care for her own aging mother, a permanent resident who has had difficulty supporting herself financially while Ms. Gonzalez was detained.[79] Ms. Gonzalez was not the only person who suffered from her prolonged detention beyond the 90-day removal period. Extensive social science literature documents the disruptive nature of detention on families and communities generally,[80] and the suffering occasioned by a loved one's detention is amplified when the detention is neither linked to a crime nor has a foreseeable end.

Family members of detained Mariel Cubans have engaged in a number of hunger strikes to call attention to the arbitrary nature of the detention process and the delays in providing statutorily mandated reviews. In March 1999, for example, six parents went without food to force the INS to set a date for the review of their sons' cases. "We are afraid that [local INS director] Mr. Wallis will put the files in a drawer," said striker Eladio Alfonso. After 47 days, the INS set a date to interview and review the six detainees. Upon review, five of the six detainees were released.[81]

The sacrifices that family members have made to secure adequate custody review for their loved ones illustrate the depth of suffering and frustration generated by indefinite detention. This suffering is exacerbated by detention policies that ignore family and community ties:

> INS detainees are frequently transferred from facility to facility and state to state. Decisions about when and where detainees are transferred are made at the district level and informed by such

79. *Id.*

80. For a discussion and review of the literature, *see* John Hagan and Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 Crime & Just. 121 (1999).

81. Andres Vigliucci, *Hunger Strikers to Forgo Fluids Until Krome sets a Decision Date*, Miami Herald, Apr. 30, 1999.

things as court appearances, immigration case status and availability and cost of bed space, but the INS rarely considers the location of families, friends, or legal counsel.[82]

Indefinite detention also ignores the valuable contributions individuals may offer their communities. After nearly twenty years of detention, Mr. Alonso-Rodriguez now helps other Cubans adjust to their lives in the United States.

CONCLUSION

For the reasons stated above, *Amici Curiae* urge the Court to reverse the decision of the Court of Appeals of the Eleventh Circuit.

Respectfully submitted,

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82. Human Rights Watch Report, *United States: Locked Away: Immigration Detainees in Jails in the United States*, *supra*.

83. Amici are grateful to Neerav Kingsland, Kevin Kish, Eunice Lee, and Julie Maupin of the Allard K. Lowenstein International Human Rights Clinic at Yale Law School for their extraordinary contributions to this brief.

[Letterhead of United Nations High Commissioner
For Refugees]

9 October 2002

Ms. Lisa Ramirez, Attorney
Catholic Charities of Orange County, Inc.
1800 E. McFadden Avenue
Santa Ana, CA 92705

Re: Request for Assistance / Saleh / Iraq / ROW # 72798

Dear Ms. Ramirez:

I am writing in response to your recent request for assistance from our Office regarding Mr. Saleh. This letter is being sent to you by facsimile in the interest of time; the original will be mailed to you. You provided our office with some factual background on his circumstances and asylum claim and inquired whether he currently has legal status or residency in Turkey and whether Turkish immigration law allows for refugees to be returned to Turkey.

We have received an email correspondence dated 8 October 2002 from the UNHCR Office in Ankara, Turkey. According to the records of that office, Mr. Saleh Zaki Mohammadi registered with UNHCR on April 1, 1991 and interviewed twice, on April 29, 1992 and July 30, 1992. His asylum application was rejected with no right to appeal, according to UNHCR policy applied in 1991 to Iraqi asylum seekers.

Our office informs us that Mr. Saleh entered Turkey and obtained his residency permit right after the Gulf War, according to a policy implemented for Iraqi asylum seekers who fled Iraq in 1991. We are also informed that Mr. Saleh

would have been eligible to apply for Turkish citizenship after five years of uninterrupted legal residence in Turkey under Turkish law. If Mr. Saleh applied for and received Turkish citizenship, then he would have the right to return to Turkey. However, if not, then he has no legal status or residency in Turkey. In addition, Turkish law does not allow for refugees and rejected asylum-seekers to return.

We note that though Turkey is a signatory to the 1951 Convention Relating to the Status of Refugees, it did so with a geographical limitation, such that non-European refugees are only granted temporary protection in Turkey. Nearly all of these refugees need to be resettled by UNHCR to other countries.

I hope that this information is useful. Please do not hesitate to contact me if I can be of further assistance. In all future correspondence to this office, please include the five-digit ROW number noted above.

Sincerely,

/s/ Larry Katzman

Larry Katzman
Legal Counselor

[Letterhead of UNHCR]

21 October 2002

VIA FACSIMILE (714) 542-3020

Lisa Ramirez, Esq.
Catholic Charities of Orange County, Inc.
1800 E. McFadden Ave.
Santa Ana, CA 92705

Re: Request for Assistance / Saleh / Iraq / ROW # 72798

Dear Ms. Ramirez:

I am writing in response to your request for clarification of whether your client, Mr. Zaki Saleh, would at this time be allowed entry into Turkey.

As we indicated in our letter of 9 October 2002, Mr. Saleh was not recognized as a refugee by UNHCR and cannot be readmitted to Turkey as a refugee.

Our Office cannot confirm Mr. Saleh's immigration status while he was in Turkey. As we mentioned in our letter of 9 October 2002, under the 1934 Settlement Law of Turkey, individuals of Turkmen ethnicity have the opportunity to apply for Turkish citizenship after five years of uninterrupted legal residence. This law is applied in a discretionary manner. If Mr. Saleh did not become a Turkish citizen during his stay in Turkey or gain some other type of permanent status, he has no right to reenter Turkey or to reinitiate his residence under that law. If he was removed to Turkey, it is likely that he would be removed to Iraq.

I hope that this information is useful to you and the United States authorities considering Mr. Saleh's case.

Sincerely,

/s/ H. Elizabeth Dallam

H. Elizabeth Dallam
Legal Counselor

[Letterhead of Catholic Charities of Orange County]

July 3, 2003

Headquarters Post Decision Unit
c/o Officer Robert Naranjo
2001 Seaside Avenue
San Pedro, CA 90731

SENT VIA FACSIMILE (310) 732-0770

RE: Zaki Mohammed SALEH A77-998-654

Dear Officer Naranjo,

On August 9, 2002 I submitted a request for parole for my client, Mr. Zaki Mohammed SALEH, A77-998-654. However, at that time I did not have identification for Mr. Saleh. On October 7, 2002, I resubmitted a request parole with a copy of an Iraqi identification card along with information regarding his sponsor Mr. Abbas Saleh and a letter of recommendation from an education instructor from Santa Ana Jail.

At this time, it appears that Mr. Saleh will not be admitted into Turkey and that Iraq currently has no system for the return of its refugees. Therefore, I respectfully request that headquarters reconsider granting Mr. Saleh parole until he can safely be returned to Iraq.

Mr. Saleh is a ethnic Turkmani, born in Iraq who fled to Turkey seeking refugee status. During Mr. Saleh's trial I sought the assistance from the United Nations High Commission for Refugees in determining whether Mr. Saleh was permanently resettled and could be readmitted to Turkey. As indicated in the enclosed letters from the UNHCR dated

October 9, 2002 and October 21, 2002, Mr. Saleh was not recognized as a refugee by the Commission and thus cannot be readmitted to Turkey as a refugee.

Additionally, on October 23, 2002, I sent a letter to the Consulate General of The Republic of Turkey to request assistance in determining Mr. Saleh's legal status in Turkey. I spoke with Mr. Serdar Demir, Secretary and received oral confirmation from the Consulate that Mr. Saleh would not be permitted entry into Turkey.

Mr. Saleh has been in detention since April 10, 2002.

I was hopeful that at his 90-day review Mr. Saleh would be released to the custody of his sponsor. However, in a decision dated March 14, 2003, Mr. Saleh was ordered detained due to his lack of cooperation to assist with his travel documents.

Mr. Saleh is willing to cooperate in every way possible, however Mr. Saleh does not speak English fluently and did not understand the contents of form I-229(a). Therefore, he did not provide the necessary information. If this information is still needed please contact me directly and my office can provide you with the necessary information.

In light of the fact that Mr. Saleh will not be admitted into Turkey and that Iraq currently has no system for the return of its refugees, I respectfully request that headquarters reconsider granting Mr. Saleh parole until he can safely be returned to Iraq.

Please contact me at (714) 347-9656 if you have any questions or if you need additional information. Thank you for your consideration of this matter.

Sincerely,

Lisa Ramirez, Esq.

/s/ Lisa D. Ramirez

Enclosures:
Letter from UNHCR dated October 9, 2002
Letter from UNHCR dated October 21, 2002
Letter to Consulate of Turkey

[Letterhead of U.S. Department of Justice]
[Immigration and Naturalization Service]

SALEH, ZAKI MOHAMMED A77 998 654
San Pedro Service Processing Center
2001 Seaside Avenue
San Pedro, Ca 90731

Notice of Failure to Comply Pursuant to 8 CFR 241.4(g)

This letter is to inform you that your custody status has been reviewed and it has been determined that you will not be released from the custody of the Immigration and Naturalization Service (Service) at this time. This decision has been made based on a review of your file and/or your personal interview and consideration of any information you submitted to the Service's reviewing officials.

On February 19, 2003, you were advised, via form I-229(a) and Instruction Sheet to Alien, of specific requirements to complete and were given 30 days to comply with your obligation to assist in obtaining a travel document. The burden to obtain a travel document for your removal does not solely rest with the Service. Pursuant to Section 241(a)(1)(C) of the Immigration and Nationality Act (INA), you are required to make timely and good faith efforts to obtain travel or other documents necessary for your removal from the United States. If you fail to make these efforts, Section 241(a)(1)(C) allows for the extension of the removal period. As you have refused to provide your biographical information contained in form I-217, Information for Travel Document, you have failed to comply with your obligation and are acting to prevent your removal from the United States. The removal period is therefore extended in your case.

As you are still within the removal period, you are to remain in Service custody until you demonstrate that you are making reasonable efforts to comply with the order of removal, and that you are cooperating with the Service's efforts to remove you.

You are also advised that continued willful failure or refusal on your part to make timely application in good faith for travel or other documents necessary for your departure, or any conspiracy or actions to prevent your removal or obstruct the issuance of a travel document, will subject you to criminal prosecution under 8 USC Section 1253(a).

/s/ Robert D. Hodgson Date: 3/14/03
Robert D. Hodgson, Assistant District Director
Detention & Removal Operations

Dear Ms. Ramirez, April 7, 2003

I received the enclosed notice from the deportation officer. I'm told I refused to cooperate giving some information about myself. I don't understand the letter or what they want. I need your help please. I want to cooperate so I can get out of custody. My English is not good and I don't understand what I need to do. Could you please help me? You're the only one who helps me and I appreciate all of your help. Thank you.

Sincerely,

s/ Zaki Seleh

Zaki Seleh

Mod – 3B

SAJ

3/25/03 – handed review [illegible writing]

** This letter was originally handwritten but was copied to typeface for purposes of this brief. Any illegible handwriting is designated as such.

Lisa, 10/28/03

I am writing to you regarding a couple of different issues concerning my case.

First of all, please be advised that I have been transferred from San Pedro to the Las Vegas City Jail. My new mailing address is as follows:

Zaki Mohammad Saleh #03-1114-F

City of Las Vegas Department of Detention and Enforcement

3300 East Stewart Avenue

Las Vegas, Nevada 89101

Secondly, I would like to know what is going on with my case. I have been in custody for almost 19 months now, and I still have no idea what's going on with my case. Please, I respectfully request that you write me back as soon as possible with an update on my case. I would specifically like to know when am I going to be released, or when am I going to be deported. I am getting tired of waiting. Please advise me as soon as possible as to what's going on, and when should I expect to be released or deported?

The third and final issue I would like you to help me with, if at all possible, is that I fear for my safety at this facility. There is a lot of arguing and fighting taking place here. I am an I.N.S. inmate (Non-criminal), and I am being housed in a block full of criminals. I do not feel safe here, and I need to be moved or transferred to a different place which houses only I.N.S. inmates. I almost had a fight yesterday, and therefore I am concerned for my safety. Please make some phone calls and help me with this matter as soon as possible. My life and my safety and well-being depends on it!

I would like to thank you in advance for your time and attention in these matters. I look forward to hearing from you soon.

Sincerely yours,

/s/ Zaki Mohammad Saleh

Zaki Mohammad Saleh

** This letter was originally handwritten but was copied to typeface for purposes of this brief. Any illegible handwriting is designated as such.

OMB No. 1115-0086

U.S. Department of Justice
Immigration and Naturalization Service

Application for Asylum and for Withholding of Removal

Start Here- Please Type or Print. **USE BLACK INK. SEE THE SEPARATE INSTRUCTION PAMPHLET FOR INFORMATION ABOUT ELIGIBILITY AND HOW TO COMPLETE AND FILE THIS APPLICATION.** (Note: There is NO filing fee for this application.)

Please check the box if you also want to apply for withholding of removal under the Convention Against Torture. ☐

PART A.I. INFORMATION ABOUT YOU

1. Alien Registration Number(s)(A #'s) *(if any)* **77998654**			2. Social Security No. *(if any)*
3. Complete Last Name **Saleh**	4. First Name **Zaki**		5. Middle Name **Mohammed**
6. What other names have you used *(Include maiden name and aliases.)* **Faisal Abdul Karim**			
7. Residence in the U.S. C/O **Santa Ana Jail**			Telephone Number **N/A**
Street Number and Name **60 Civic Center Drive**			Apt. No.
City **Santa Ana**	State **CA**		ZIP Code **92705**
8. Mailing Address in the U.S., if other than above **Santa Ana Jail**			Telephone Number **N/A**
Street Number and Name **P.O. Box 22003**			Apt. No.
City **Santa Ana**	State **CA**		ZIP Code **92705**
9. Sex ☒ Male ☐ Female	10. Marital Status: ☒ Single ☐ Married ☐ Divorced ☐ Widowed		
11. Date of Birth *(Mo/Day/Yr)* **05/01/1968**	12. City and Country of Birth **Karkouk Iraq**		
13. Present Nationality *(Citizenship)* **Iraqi**	14. Nationality at Birth **Iraqi**	15. Race, Ethnic or Tribal Group **Turkmani**	16. Religion **Islam-Sunni**

17. *Check the box, a through c that applies:*
a. ☐ I have never been in immigration court proceedings.
b. ☒ I am now in immigration court proceedings.
c. ☐ I am not now in immigration court proceedings, but I have been in the past.

18. *Complete 18 a through c.*
a. When did you last leave your country? *(Mo/Day/Yr)* **3-30-91**
b. What is your current I-94 Number, if any? _____

c. Please list each entry to the U.S. beginning with your most recent entry.
List date (Mo/Day/Yr), and your status for each entry. (Attach additional sheets as needed)

Date	**4-10-02**	Place	**L.A. International Airport**	Status		Date Status Expires	
Date		Place		Status			
Date		Place		Status			
Date		Place		Status			

19. What country issued your last passport or travel document	20. Passport # Travel Document #	21. Expiration Date *(Mo/Day/Yr)* / /
22. What is your native language? **Turkmani**	23. Are you fluent in English? ☐ Yes ☒ No	24. What other languages do you speak fluently? **Arabic**

FOR EOIR USE ONLY

FOR INS USE ONLY

Action:
Interview Date: _____
Decision:
__ Approval Date _____
__ Denial Date: _____
__ Referral Date: _____
Asylum Officer ID# _____

PART A.II. INFORMATION ABOUT YOUR SPOUSE AND CHILDREN

Your Spouse ☒ I am not married. (Skip to *Your Children, below*)

1. Alien Registration Number (A#) *(If Any)*	2. Passport/ID Card No. *(If any)*	3. Date of Birth *(Mo/Day/Yr)*	4. Social Security No. *(If any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Maiden Name
9. Date of Marriage *(Mo/Day/Yr)*	10. Place of Marriage	11. City and Country of Birth	
12. Nationality *(Citizenship)*	13. Race, Ethnic or Tribal Group	14. Sex ☐ Male ☐ Female	
15. Is this person in the U.S.? ☐ Yes *(Complete blocks 16 to 24)* ☐ No *(Specify location)*			
16. Place of last entry in U.S.?	17. Date of last entry in the U.S. *(Mo/Day/Yr)*	18. I-94 No. *(If any)*	19. Status when last admitted *(Visa type, if any)*
20. What is your spouse's current status?	21. What is the expiration date of his/her authorized stay, if any? *(Mo/Day/Yr)*	22. Is your spouse in immigration court proceedings? ☐ Yes ☐ No	23. If previously in the U.S., date of previous arrival *(Mo/Day/Yr)*
24. If in the U.S., is your spouse to be included in this application? *(Check the appropriate box.)* ☐ Yes *(Attach one (1) photograph of your spouse in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)* ☐ No			

Your Children. Please list **ALL** of your children, regardless of age, location, or marital status

☒ I do not have any children *(Skip to Part A.III., Information about Your Background.)*

☐ I do have children. Total number of children _____

(Use Supplement A Form I-589 or attach additional pages and documentation if you have more than four (4) children.)

1. Alien Registration Number (A#) *(if any)*	2. Passport/ID Card No. *(If any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. Social Security No. *(If any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(Mo/Day/Yr)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic or Tribal Group	12. Sex ☐ Male ☐ Female
13. Is this child in the U.S.? ☐ Yes *(Complete Blocks 14 to 21)* ☐ No *(Specify Location)*			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? *(Mo/Day/Yr)*	16. I-94 No. *(If any)*	17. Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(Mo/Day/Yr)*	20. Is your child in immigration court proceedings? ☐ Yes ☐ No	
21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)* ☐ Yes *(Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person)* ☐ No			

PART A.II. INFORMATION ABOUT YOUR SPOUSE AND CHILDREN Continued

1. Alien Registration Number (A#) *(if any)*	2. Pass/ID Card No. *(if any)*	3. Marital Status *(Married Single, Divorced, Widowed)*	4. Social Security No. *(if any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(Mo/Day/Year)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic or Tribal Group	12. Sex ☐ Male ☐ Female

13. Is this child in the U.S.? ☐ Yes *(Complete blocks 14 to 21)* ☐ No *(Specify Location)*

14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? *(Mo/Day/Yr)*	16. I-94 No. *(If any)*	17. Status when last admitted
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, *(if any)* *(Mo/Day/Yr)*	20. Is your child in immigration court proceedings? ☐ Yes ☐ No	

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box)*

☐ Yes *(Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)*

☐ No

1. Alien Registration Number *(A#)(If any)*	2. Passport/ID Card No. *(If any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. Social Security No.
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(Mo/Day/Yr)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic or Tribal Group	12. Sex ☐ Male ☐ Female

13. Is this Child in the U.S.? ☐ Yes *(Complete blocks 14 to 21)* ☐ No *(Specify Location)*

14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? *(Mo/Day/Yr)*	16. I-94 No. *(If any)*	17. Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any?	20. Is your child in immigration court proceedings? ☐ Yes ☐ No	

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box)*

☐ Yes *(Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)*

☐ No

1. Alien Registration Number (A#) *(If any)*	2. Passport/ID Card No. *(If any)*	3. Marital Status *(Married Single, Divorced, Widowed)*	4. Social Security No. *(If any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(Mo/Day/Yr)*
9. City and Country of Birth	10 Nationality	11. Race, Ethnic or Tribal Group	12. Sex ☐ Male ☐ Female

13. Is the child in the U.S.? ☐ Yes (Complete blocks 14 to 21) ☐ No (Specify Location)

14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? *(Mo/Day/Yr)*	16. I-94 No. *(If any)*	17. Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(Mo/Day/Yr)*	20. Is your child in immigration court proceedings ☐ Yes ☐ No	

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box)*

☐ Yes *(Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)*

☐ No

PART A.III. INFORMATION ABOUT YOUR BACKGROUND

1. Please list your last address where you lived before coming to the U.S. If this is not the country where your fear persecution, also list the last address in the country where you fear persecution. *(List Address, City/Town, Department, Province, or State, and Country.) (Use Supplement B Form I-589 or additional sheets of paper if necessary.)*

Number and Street *(Provide if available)*	City/Town	Department, Province or State	Country	Dates From *(Mo/Yr)*	Dates To *(Mo/Yr)*
Kurk Bose Mols AP 2	Istanbul		Turkey	1991	4/2002
Tarayan Place Bldg 21/22	Karkouk		Iraq	1968	1991

2. Provide the following information about our residences during the last five years. List your present address first. *(Use Supplement Form B or additional sheets of paper if necessary.)*

Number and Street	City/Town	Department, Province or State	Country	Dates From *(Mo/Yr)*	Dates To *(Mo/Yr)*
60 Civic Center Drive	Santa Ana	CA	Turkey	1991	

3. Provide the following information about your education, beginning with the most recent. *(Use Supplement B Form I-589 or additional sheets of paper if necessary.)*

Name of School	Type of School	Location *(Address)*	Attended From *(Mo/Yr)*	Attended To *(Mo/Yr)*
Saref Rata	Secondary school	Karkouk, Iraq	—	1980
Adalt	Elementary school	Karkouk, Iraq	1974	—

4. Provide the following information about your employment during the last five years. List your present employment first. *(Use Supplement Form B or additional sheets of paper if necessary.)*

Name and Address of Employer	Your Occupation	Dates From *(Mo/Yr)*	Dates To *(Mo/Yr)*
Istanbul, Turkey	Self employed vendor	04 1994	04 2002
Ene Basna Istanbul, Turkey	Tailor	1991	04 1994

5. Provide the following information about your parents and siblings (brother and sisters). Check box if the person is deceased. *(Use Supplement B Form I-589 or additional sheets of paper if necessary.)*

Name	City/Town and Country of Birth	Current Location
Mother Bahie H Sherif	Karkouk, Iraq	☐ Deceased Arafa
Father Mohammed Saleh	Karkouk, Iraq	☒ Deceased Mosqla
Siblings		☐ Deceased
		☐ Deceased

PART B. INFORMATION ABOUT YOUR APPLICATION

(Use Supplement B Form I-589 or attach additional sheets of paper as needed to complete your responses to the questions contained in PART B.)

When answering the following questions about your asylum or other protection claim (withholding of removal under 241(b)(3) of the Act or withholding of removal under the Convention Against Torture) you should provide a detailed and specific account of the basis of your claim to asylum or other protection. To the best of your ability, provide specific dates, places, and descriptions about each event or action described. You should attach documents evidencing the general conditions in the country from which you are seeking asylum or other protection and the specific facts on which you are relying to support your claim. If this documentation is unavailable or you are not providing this documentation with your application, please explain why in your responses to the following questions. Refer to Instructions, Part 1: Filing Instructions, Section II, "Basis of Eligibility," Parts A-D, Section V, "Completing the Form," Part B, and Section VII, "Additional Documents the You Should Submit" or more information on completing this section of the form.

1. Why are you applying for asylum or withholding of removal under section 241(b)(3) of the Act, or for withholding of removal under the Convention Against Torture? Check the appropriate box(es) below and then provide detailed answers to questions A and B below.

I am seeking asylum or withholding of removal based on

- ☒ Race
- ☐ Religion
- ☐ Nationality
- ☒ Political opinion
- ☒ Membership in a particular social group
- ☒ Torture Convention

A. Have you, your family, or close friends or colleagues ever experienced harm or mistreatment or threats in the past by anyone?

☐ No ☒ Yes If your answer is "Yes," explain in detail:

1) What happened;
2) When the harm or mistreatment or threats occurred;
3) Who caused the harm or mistreatment or threats; and
4) Why you believe the harm or mistreatment or threats occurred.

My father Mohammed Saleh was executed by the Iraqi government. I served as a private in Saddam's army. I was sixteen when I started in 1983. I was assigned to a regiment in Hafriel-baten, Southern Iraq. During "Operation Desert Storm" I shot myself in the shoulder. I was afraid of advancing against U.S. forces. My superior officers noticed the powder burn on my arm and knew it had been a self inflicted wound. I was taken to the military hospital in Baghdad. I was a patient for a week at the Rashid Military Hospital. I was then taken before a military court and interrogated about my self inflicted wound. I denied that I had injured myself and was subjected to torture. Electric shock was used against me and I was still able to deny my wound. Then the guards had forcible sex with me. They sodomized me until I confessed to having inflicted the wound myself. I still suffer from occasional bleeding as a result of being sodomized by the Iraqi Secret Service Gurads during my captivity in 1991. (see attached statement)

B. Do you fear harm or mistreatment if you return to your home country?

☐ No ☒ Yes If your answer is "Yes," explain in detail:

1) What harm or mistreatment you fear;
2) Who you believe would harm or mistreat you; and
3) Why you believe you would be harmed or mistreated.

I have been subjected to torture before. If I am returned to Iraq, I will most likely be tortured and sodomized once again by the Iraqi government. Iraqi Secret Service guards would take me into custody and question me about my liberation by the Kurds in 1991. I would also face having my death sentence be carried out. If I was returned to Turkey, the Turkish government would turn me over to the Iraqi government.

(see attached statement)

PART B. INFORMATION ABOUT YOUR APPLICATION Continued

2. Have you or your family members ever been charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned in any country other than the United States?

☐ No ☒ Yes If "Yes," explain the circumstances and reasons for action.

In 1974 my father was publicly executed (hung) by the Iraqi governemtn because they thought he was affiliated with the Turkmani party. [redacted]. I was also imprisoned by the Iraqi government and sentenced to death by firing squad due to a self inflicted wound during "Operation Desert Storm".

(See attached statement)

3.A. Have you or your family members ever belonged to or been associated with any organizations or groups in your home country, such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerrilla organization, ethnic group, human rights group, or the press or media?

☐ No ☒ Yes If "Yes," describe for each person the level of participation, any leadership or other positions held, and the length of time you or your family members were involved in each organization or activity.

My family is Turkmani. We were not supporters of the Baath Party, but forced to join Otherwise, we would have been jailed or executed.

My father was executed for having different political beliefs from the Iraqi government.

B. Do you or your family members continue to participate in any way in these organizations or groups?

☒ No ☐ Yes If "Yes," describe for each person, you or your family members' current level of participation, any leadership or other positions currently held, and the length of time you or your members have been involved in each organization or group.

4. Are you afraid of being subjected to torture in your home country or any other country to which you may be returned?

☐ No ☒ Yes If "Yes," explain why you are afraid and describe the nature of the torture you fear, by whom, and why it would be inflicted.

I have been persecuted by the Iraqi government before. When I was a prisoner in Iraq, I was subjected to torture, including electric shock and sodomy. If I am returned to Iraq, my death sentence would be carried out and I would face the firing squad. If I am returned to Turkey, I would be arrested by the Turkish Police and returned to Iraq.

(See attached statement)

PART C. ADDITIONAL INFORMATION ABOUT YOUR APPLICATION

(Use Supplement B Form I-589 or attach additional sheets of paper as needed to complete your responses to the questions contained in Part C.)

1. Have you, your spouse, your child(ren), your parents, or your siblings ever applied to the United States Government for refugee status, asylum, or withholding of removal? ☒ No ☐ Yes

If "Yes" explain the decision and what happened to any status you, your spouse, your child(ren), your parents, or your siblings received as a result of that decision. Please indicate whether or not you were included in a parent or spouse's application. If so, please include your parent or spouse's A-number in your response. If you have been denied asylum by an Immigration Judge or the Board of Immigration Appeals, please describe any change(s) in conditions in your country or your own personal circumstances since the date of the denial that may affect your eligibility for asylum.

2. A. After leaving the country from which you are claiming asylum, did you or your spouse or child(ren), who are now in the United States, travel through or reside in any other country before entering the United States? ☐ No ☒ Yes

B. Have you, your spouse, your child(ren), or other family members such as your parents or siblings ever applied for or received any lawful status in any country other than the one from which you are now claiming asylum? ☐ No ☒ Yes

If "Yes" to either or both questions (2A and/or 2B), provide for each person the following: the name of each country and the length of stay; the person's status while there; the reasons for leaving; whether the person is entitled to return for lawful residence purposes; and whether the person applied for refugee status or for asylum while there, and, if not, why he or she did not do so.

When I left Iraq in 1991, I went to Istanbul, Turkey. I reported to the security agency of Turkey immediately and was granted lawful permanent resident alien status. My mother followed me to Turkey in 1995. Likewise, my mother was also granted legal permanent resident status upon entering Turkey. However, there is a great deal of tension between Iraq and Turkey. It is not a stable relationship. Iraqis are treated poorly by the Turkish police, and are harassed. Money is taken from them, and I no longer felt secure. Every two years I had to renew my legal status and had difficulty doing so.

3. Have you, your spouse, or child(ren) ever ordered, incited, assisted, or otherwise participated in causing harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion?

☒ No ☐ Yes If "Yes," describe in detail each such incident and your own or your spouse's or child(ren)'s involvement.

PART C. ADDITIONAL INFORMATION ABOUT YOUR APPLICATION Continued

4. After you left the country where you were harmed or feared harm, did you return to that country?

☒ No ☐ Yes If "Yes," describe in detail the circumstances of your visit (for example, the date(s) of the trip(s), the purpose(s) of the trip(s), and the length of time you remained in that country for the visit(s)).

5. Are you filing the application more than one year after your last arrival in the United States?

☒ No ☐ Yes If "Yes," explain why you did not file within the first year after you arrived. You should be prepared to explain at your interview or hearing why you did not file your asylum application within the first year after you arrived. For guidance in answering this question, see Instructions, Part 1: Filing Instructions, Section V. "Completing the Form," Part C.

6. Have you or any member of your family included in the application ever committed any crime and/or been arrested, charged, convicted and sentenced for any crimes in the United States?

☒ No ☐ Yes If "Yes," for each instance, specify in your response what occurred and the circumstances; dates; length of sentence received; location; the duration of the detention or imprisonment; the reason(s) for the detention or conviction; any formal charges that were lodged against you or your relatives included in your application; the reason(s) for release. Attach documents referring to these incidents, if they are available, or an explanation of why documents are not available.

PART D. YOUR SIGNATURE

After reading the information regarding penalties in the instructions, complete and sign below. If someone helped you prepare this application, he or she must comp... Part E.

I certify, under penalty of perjury under the laws of the United States of America, that this application and the evidence submitted with it are all true and correct. Title 18, United States Code, Section 1546, provides in part, "Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of Title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or knowingly presents any such application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement or which fails to contain any reasonable basis in the law or fact - shall be fined in accordance with this title or imprisoned not more than five years, or both." I authorize the release of any information from my record which the Immigration and Naturalization Service needs to determine eligibility for the benefit I am seeking.

Staple your photograph here or the photograph of the family member to be included on the extra copy of the application submitted for that person.

WARNING: Applicants who are in the United States illegally are subject to removal if their asylum or withholding claims are not granted by an Asylum Officer or an Immigration Judge. Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings even if the application is later withdrawn. Applicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act. See 208(d)(6) of the Act and 8 CFR 208.20.

Print Complete Name	Write your name in your native alphabet
Zaki Mohammed Saleh	

Did your spouse, parent, or child(ren) assist you in completing this application? ☒ No ☐ Yes *(If "Yes," list the name and relationship.)*

(Name) _____ *(Relationship)* _____ *(Name)* _____ *(Relationship)* _____

Did someone other than your spouse, parent, or child(ren) prepare this application? ☐ No ☒ Yes *(If "Yes," complete Part E)*

Asylum applicants may be represented by counsel. Have you been provided with a list of persons who may be available to assist you, at little or no cost, with your asylum claim? ☒ No ☐ Yes

Signature of Applicant *(The person in Part A.1.)*

[_____] 6/18/02

Sign your name so it all appears within the brackets — Date *(Mo/Day/Yr)*

PART E. DELCLARATION OF PERSON PREPARING FORM IF OTHER THAN APPLICANT, SPOUSE, PARENT OR CHILD

I declare that I have prepared this application at the request of the person named in Part D, that the responses provided are based on all information of which I have knowledge, or which was provided to me by the applicant and that the completed application was read to the applicant in his or her native language or a language he or she understands for verification before he or she signed the application in my presence. I am aware that the knowing placement of false information on the Form I-589 may also subject me to civil penalties under 8 U.S.C. 1324(c)

Signature of Preparer	Print Complete Name: Lisa Ramirez		
Daytime Telephone Number: 714 957-4647	Address of Preparer Street Number and Name: 1506 Brookhollow Drive Suite #112		
Apt. No.	City: Santa Ana	State: Cal	ZIP Code: 92705

PART F. TO BE COMPLETED AT INTERVIEW OR HEARING

You will be asked to complete this Part when you appear before an Asylum Officer of the Immigration and Naturalization Service (INS), or an Immigration Judge of the Executive Office for Immigration Review (EOIR) for examination.

I swear (affirm) that I know the contents of this application that I am signing, including the attached documents and supplements, that they are all true to the best of my knowledge taking into account correction(s) numbered _____ to _____ that were made by me or at my request

Signed and sworn to before me by the above named applicant on:

_____ _____

Signature of Applicant — Date *(Mo/Day/Yr)*

_____ _____

Write Your Name in Your Native Alphabet — Signature of Asylum Officer or Immigration Judge

43 (193D)

Supreme Court, U.S.
FILED
FEB 24 2004
OFFICE OF THE CLERK

(2)

No. 03-7434

In the Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

ROBERT A. WALLIS, District Director,
Immigration and Naturalization Service,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

NORTH CAROLINA JUSTICE AND COMMUNITY DEVELOPMENT CENTER *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. INADMISSIBLE ALIENS SUCH AS DANIEL BENITEZ WHO ARE PHYSICALLY PRESENT WITHIN THE TERRITORY OF THE UNITED STATES ARE PERSONS UNDER THE FIFTH AMENDMENT AND THEREFORE ENTITLED TO DUE PROCESS OF LAW. 8

A. Due Process Rights Attach Once an Individual is Physically Present Within the Territory of the United States. 8

1. Justice Kennedy's Dissent in *Zadvydas* Appropriately Addresses the Threshold Constitutional Question Raised in this Case. 10

2. Justice Kennedy's Conclusions in *Zadvydas* are Firmly Rooted in this Court's Jurisprudence. 10

B. Holding that Aliens Paroled into the United States Do Not Have Due Process Rights Would Contradict the Purpose of the Entry Fiction and Irrationally Grant More Protection to Undetected Aliens than to Parolees Whose Presence Was Previously Deemed Benign. 12

II. DANIEL BENITEZ HAS A DUE PROCESS RIGHT TO JUDICIAL REVIEW OF HIS DETENTION. 13

A. Indefinite Detention Without Review of the Government's Reasoning Shocks the Conscience. 14

B. The Government Has the Burden to Show that a Detention is Reasonable. 15

C. International Law Also Condemns Indefinite Detention. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 17

Benitez v. Wallis, 337 F.3d 1289 (11th Cir. 2003) 8, 15

DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989) 15

Estelle v. Gamble, 429 U.S. 97 (1976) 15

Foucha v. Louisiana, 504 U.S. 71 (1992) 13

Kansas v. Hendricks, 521 U.S. 346 (1997) . . . 14, 15

Korematsu v. United States, 323 U.S. 214 (1944) . . 7

Lawrence v. Texas, 123 S. Ct. 2472 (2003) 16

Leng May Ma v. Barber, 357 U.S. 185 (1958) 13

Matthews v. Diaz, 426 U.S. 67 (1976) 12

Muller v. Oregon, 208 U.S. 412 (1907) 17

New York v. United States, 326 U.S. 572 (1946) . . . 17

The Paquete Habana, 175 U.S. 677 (1900) 16

Plyler v. Doe, 457 U.S. 202 (1982) 11, 13

Printz v. United States, 521 U.S. 898 (1997) 17

Reno v. Flores, 507 U.S. 292 (1993) 15

Rochin v. California, 342 U.S. 165 (1952) 14

Roe v. Wade, 410 U.S. 113 (1973) 17

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 8, 12

United States v. Montoya de Hernandez, 472 U.S. 531 (1985) 16

United States v. Salerno, 481 U.S. 739 (1987) . 14, 15

Wong Wing v. United States, 163 U.S. 228 (1896) . 11

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 11

Youngberg v. Romeo, 457 U.S. 307 (1982) 15

Zadvydas v. Davis, 533 U.S. 678 (2001) . . . . . *passim*

Statutes

United States Constitution, Amendment 5 . . . . *passim*

United States Constitution, Amendment 14 . . . *passim*

Immigration & Nationality Act § 212 (d)(5)(A), 8 U.S.C. § 1182 (d)(5)(A) (2000) 8

Other

Estimates of Numbers of Unauthorized Migrants Residing in the United States: The Total, Mexican, and Non-Mexican Central American Unauthorized Populations in Mid-2001 (Nov. 2001), *available at* http://www.pewhispanic.org/page.jsp?page=Content%20by%20Category (last visited Feb. 23, 2004). . . 3

Edward Bates Cole, *What Difference Does It Make Whether You Are Deportable or Excludable? The Supreme Court Refuses to Say*, 28 N.C. J. Int'l & Comp. Reg. 567, 567–68 (2003). 9

International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 168, U.N. Doc. A/6316 Art. 9 para. 4 (1967) 17-18

Marcus Stern, *INS jumps estimate of illegal immigrants: Number put at 8 million; growth rate is increased*, SAN DIEGO UNION-TRIBUNE, Jan. 31, 2003, *available at* http://www.signonsandiego.com/news/mexico/20030131-9999_1n31immig.html (last visited Feb. 23, 2004). 3

N.C. Department of Health and Human Services, *New Arrivals Report by Country of Origin, For Report Period 10/1/2001 to 7/24/2003* (internal report) (on file with the North Carolina Justice and Community Development Center). 3

http://www.ncjustice.org/about.htm. 1

http://www.ncjustice.org/ilap/index.html. 2

Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) 17

Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., 183d plen. Mtg. Art. 9, at 137, U.N. Doc. A/810 (1948) 17

United States Census Bureau, *Hispanic or Latino Origin: All Races. Mapping Census 2000: The Geography of U.S. Diversity* (Dec. 7, 2001), *available at* http://www.census.gov/population/www/cen2000/dt_atlas.html (last visited Feb. 23, 2004). 2

United States Census Bureau, *Percent Distribution of the Foreign-Born Population by World Region of Birth for the United States, Regions, States, and Puerto Rico: 2000, available at* http://www.census.gov/prod/2003pubs/c2kbr-34.pdf (Table 4) (last visited Feb. 23, 2004). 2

INTEREST OF AMICUS CURIAE[1]

The North Carolina Justice and Community Development Center (Justice Center) was established to reduce, and ultimately, eliminate poverty in North Carolina by ensuring that low-income, working poor and minority individuals, and the communities in which they live, have the resources and services necessary to transition from poverty to economic security. To accomplish this mission, the Justice Center "works in collaboration with North Carolina's disadvantaged individuals and communities employing a multi-forum advocacy model in which the Center uses four primary strategies": litigation, research and policy development, public policy advocacy, and grassroots empowerment.[2] The goal of the Justice Center's litigation strategy is to "ensure that the rights of traditionally underrepresented populations are protected" by "undertaking high-impact litigation."[3] Daniel Benitez faces a similar plight to that faced by individuals on whose behalf the Justice Center advocates everyday. Such immigration cases fall squarely within the Justice Center's mission.

A core goal of the Justice Center is to ensure that immigrants and newcomers to the United States have the legal

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[1] This brief is filed with the consent of the parties. No person or entity other than Amicus, their counsel, or their members made a monetary contribution to this brief. Amicus is grateful to Duke University School of Law students Judson D. Brown, Donald E. Childress III, and David H. Koysza for their invaluable contributions to this brief.

[2] *See* http://www.ncjustice.org/about.htm.

[3] *Id.*

resources necessary to ensure that their civil rights are protected and that immigrants have access to counsel in all immigration matters.[4] Through its Immigrants Legal Assistance Project, the Justice Center represents low-income immigrants in a variety of immigration matters in Immigration Court and before the Board of Immigration Appeals.

The proper resolution of this case is not only important to the Justice Center, it is especially important to the people of North Carolina. The population of North Carolina has changed greatly over the past twenty years. There are 392,599 North Carolinians who are Hispanic or Latino, approximately 5 percent of the State's total population.[5] Over the last decade, this segment of North Carolina's population grew by more than 394 percent, the largest percentage increase of any state in the country.[6] In addition to Latino and Hispanic immigrants, many people from other parts of the world make their home in North Carolina. Of the 430,000 foreign-born people in North Carolina, more than 93,000 are from Asia and more than 20,000 from Africa.[7] Over 1,700

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[4] *See* http://www.ncjustice.org/ilap/index.html.

[5] *See* United States Census Bureau, *Hispanic or Latino Origin: All Races. Mapping Census 2000: The Geography of U.S. Diversity* (Dec. 7, 2001), *available at* http://www.census.gov/population/www/cen2000/dt_atlas.html (last visited Feb. 23, 2004).

[6] *See id.*

[7] *See* United States Census Bureau, *Percent Distribution of the Foreign-Born Population by World Region of Birth for the United States, Regions, States, and Puerto Rico: 2000, available at* http://www.census.gov/prod/2003pubs/c2kbr-34.pdf (Table 4) (last visited Feb. 23, 2004).

refugees were resettled in North Carolina between October 2001 and July 2003, with the largest number coming from Vietnam, Bosnia/Herzegovina, Democratic Republic of Congo, Colombia, and Ukraine.[8]

North Carolina's diverse and fast growing alien-born population naturally attracts immigrants to North Carolina, both those who come legally and some who come illegally to join their relatives. Nationally, it is believed that almost 8 million persons reside in the United States without legal permission.[9] The Immigration and Naturalization Service (now the Bureau of Customs Enforcement) has estimated that over 206,000 undocumented persons live in North Carolina.[10]

As of February 5, 2004, the Justice Center was actively representing 391 individuals involved in immigration proceedings in the United States, including a large number of asylum seekers. Because the issues in this case raise important

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[8] *See* N.C. Department of Health and Human Services, *New Arrivals Report by Country of Origin, For Report Period 10/1/2001 to 7/24/2003* (internal report) (on file with the North Carolina Justice and Community Development Center).

[9] *See Estimates of Numbers of Unauthorized Migrants Residing in the United States: The Total, Mexican, and Non-Mexican Central American Unauthorized Populations in Mid-2001* (Nov. 2001), *available at* http://www.pewhispanic.org/page.jsp?page=Conte..%20by%20Category (last visited Feb. 23, 2004).

[10] *See* Marcus Stern, *INS jumps estimate of illegal immigrants: Number put at 8 million; growth rate is increased*, SAN DIEGO UNION-TRIBUNE, Jan. 31, 2003, *available at* http://www.signonsandiego.com/news/mexico/20030131-9999_1n31immig.html (last visited Feb. 23, 2004).

questions of constitutional and immigration law that have a direct bearing on the mission and ongoing litigation of the Justice Center and on its clients in North Carolina, the Justice Center has an exceptionally strong interest in properly resolving this case to ensure the preservation of liberty and due process of law for all persons who are physically present within the United States.

SUMMARY OF ARGUMENT

Although the decision in *Zadvydas* controls the outcome in this case, the Court also must make clear that in the absence of special circumstances, not presented in this case, no person physically present within the United States may be detained indefinitely without due process of law. The plain language of the Fifth Amendment, bolstered by *Zadvydas* and over a century of this Court's jurisprudence, support the claims advanced by Petitioner. Indeed, if this Court finds for the Government, the result would be to accord greater constitutional protection to those illegal aliens who sneak across the border undetected than to those who are stopped and subsequently paroled in after a determination that their presence would be benign.

Denying parolees *any* opportunity to challenge the reasons for their re-arrest and indefinite detention violates not only the guarantees of the U.S. Constitution, but also principles of international law. The indefinite detention of a previously paroled alien shocks the conscience. It not only is antithetical to a century of this Court's jurisprudence, but also runs counter to the very foundation upon which this country was built and upon which the Constitution rests.

ARGUMENT

Three years ago in *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court was faced with a serious constitutional question regarding the Government's authority to detain indefinitely an alien whose presence posed no threat to the United States but who could not be deported. To avoid addressing that question, the Court invoked the doctrine of constitutional avoidance and held that the Immigration and Nationality Act's post-removal-period detention provision presumptively limited such detentions to six months, in the absence of special circumstances. *Id.* at 689–90. As this Court then noted: "A statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 690. This case requires the Court again to confront the same constitutional problem.

As in *Zadvydas*, the Government claims that the alien in this case may be detained indefinitely. Although the context in which immigration issues are addressed has changed significantly in the three years since *Zadvydas*, nothing has changed that affects the fundamental soundness of that decision or that requires a different result in this case. The specter of terrorism unquestionably has changed the way many Americans view aliens and the process of immigration. But the issues in this case do not concern terrorism; nor has the Government sought to invoke in this case special authority given to or arrogated by it to combat terrorism. Rather, as in *Zadvydas*, this case concerns the constitutional limits on the discretion of the Government, in the absence of special circumstances, to arrest and detain indefinitely a previously paroled excludable alien who is physically present in the country, but whom the Government cannot deport.

The precise legal issue presented by the Government's position is whether an alien paroled into the United States under the so-called "entry fiction" is protected from indefinite detention by the Due Process Clause; or, whether the act of parole in the case of an excludable alien creates a special class of individuals who are physically present within the United States, but denied the constitutional protections afforded "all persons within the United States." U.S. Const. amend. V. This question exposes an apparent tension among important values: on the one hand, the constitutional protection of liberty and the collective distaste for incarceration without due process; and on the other hand, the United States's sovereign right to control who enters the country and its need to protect American communities from dangerous people. Amicus fully supports the position of Petitioner that this case ought to be decided in his favor on the basis of *Zadvydas*. But, because of the abuses that sometimes befall aliens, or those who look like aliens, in times of national crisis,[11] abuses directed at them because they look or sound different, Amicus urges the Court to make clear that in the absence of special circumstances, not presented in this case, no person physically present within the United States may be detained indefinitely without due process of law.

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[11] *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944).

I. INADMISSIBLE ALIENS SUCH AS DANIEL BENITEZ WHO ARE PHYSICALLY PRESENT WITHIN THE TERRITORY OF THE UNITED STATES ARE PERSONS UNDER THE FIFTH AMENDMENT AND THEREFORE ENTITLED TO DUE PROCESS OF LAW.

The Government attempts to avoid the thrust of the decision in *Zadvydas* by invoking the so-called "entry fiction." Specifically, the Government argues that an inadmissible alien previously paroled into the country and who cannot be deported sits "on the threshold of initial entry" and thus is not entitled to due process of law. Brief for Appellee at 19–22, *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003) (No. 02-14324). The Government relies principally upon the decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). That decision, however, will not bear the enormous weight of the Government's position.

A. Due Process Rights Attach Once an Individual is Physically Present Within the Territory of the United States.

To begin with what is not disputed, the Immigration and Nationality Act authorizes the Attorney General to parole an excludable alien into the country, without his presence constituting an admission. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (2000). The Government argues further, however, that because such a parolee has not technically entered the United States under the immigration statutes, he "lacks any [constitutional] right against continued . . . custody even if such detention is infinite and prolonged." Brief for Appellee at 19–20, *Benitez v. Wallis*, 337 F.3d 1289 (11th

Cir. 2003) (No. 02-14324). The Government's position is rooted in the so-called "entry fiction," which allows the "United States to remove the alien at any time after his or her [parole] into the United States without a hearing and treats the alien, for constitutional purposes, as if he or she never entered the country." Edward Bates Cole, *What Difference Does It Make Whether You Are Deportable or Excludable? The Supreme Court Refuses to Say*, 28 N.C. J. Int'l & Comp. Reg. 567, 567–68 (2003). By virtue of this fiction, the Government claims that, although physically present within the United States, the parolee, for purposes of immigration law, remains on the threshold of initial entry, and thus is entitled to no protection under the Constitution. Whatever its status under the immigration laws, this fiction can play no role in determining the rights of aliens like Petitioner under the Fifth Amendment to the Constitution.

The protections of the Fifth Amendment attach once a person is physically present within the territory of the United States. As this Court has held, the Due Process Clause applies not only to citizens but to "all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Thus, the Government's position is sustainable only if a person physically present in the United States, although not legally admitted under the immigration laws, is deemed not present for constitutional purposes because he is an excludable parolee. Neither *Zadvydas* nor this Court's due process jurisprudence supports such a transparent evasion of the Fifth Amendment's guarantee of due process of law.

1. Justice Kennedy's Dissent in *Zadvydas* Appropriately Addresses the Threshold Constitutional Question Raised in this Case.

Justice Kennedy's dissenting opinion in *Zadvydas*, joined by the Chief Justice in relevant part, explicitly rejected the Government's position in this case. *Zadvydas*, 533 U.S. at 705 (Kennedy, J., dissenting). There, Justice Kennedy correctly linked the protections afforded by the Due Process Clause to an individual's physical presence within the United States: "As persons within our jurisdiction, the aliens are entitled to the protection of the Due Process Clause." *Id.* Accordingly, Justice Kennedy rejected the entry fiction argument entirely: "Still, both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Id.* at 721. Amicus suggests that this reasoning alone sufficiently lays waste to the Government's position. All persons who are physically present within the United States can invoke their right under the Fifth Amendment to due process of law. That includes persons invited to enter, those who enter illegally, and those who are paroled into the country from the threshold of entry; all are "persons within our jurisdiction, [and thus] entitled to the protection of the Due Process Clause."

2. Justice Kennedy's Conclusions in *Zadvydas* are Firmly Rooted in this Court's Jurisprudence.

For over a century this Court has recognized that due process protections are implicated by the mere physical presence of a person within the borders of the United States: "The [Fifth and] [F]ourteenth [A]mendment[s] [are] not

confined to the protection of citizens. . . . These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Indeed, even illegal, inadmissible aliens physically present within the United States are entitled to due process of law under the Fifth Amendment. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guarantied [*sic*] by [the Fifth and Sixth] [A]mendments, and . . . even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."); *accord Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("*Whatever his status under the immigration laws*, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." (citations omitted) (emphasis added)). This assertion was so fundamental that even the dissent in *Plyler* did not question its validity: "I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment *applies* to aliens who, after their illegal entry into this country, are indeed physically 'within the jurisdiction' of a state." *Id.* at 243 (Burger, C.J., dissenting) (emphasis in original).

That constitutional due process protections are afforded to all those physically within our borders was most recently affirmed in *Zadvydas*. As the majority noted,

> It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our

> *geographic borders*. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

533 U.S. at 693 (citations omitted) (emphasis added). Indeed, this point is so well-established that in *Mezei*, the case principally relied upon by the Government, this Court noted, "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." 345 U.S. at 212; *see also Matthews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States," and "the Fifth Amendment . . . protects every one of these persons from deprivation of life, liberty, or property without due process of law," including those "whose presence in this country is unlawful."). Not only does the plain language of the Fifth Amendment, bolstered by *Zadvydas*, support the claims advanced by Petitioner in this case, so too does the very inconsistency of the Government's position.

B. Holding that Aliens Paroled into the United States Do Not Have Due Process Rights Would Contradict the Purpose of the Entry Fiction and Irrationally Grant More Protection to Undetected Aliens than to Parolees Whose Presence Was Previously Deemed Benign.

It is ironic that the Government in this case seeks to use the entry fiction to achieve a result that is directly contrary to the device's central purpose. Generally, the Government uses the entry fiction to avoid the very kind of indefinite

detainment that it asserts the right to impose in this case; typically the device has been invoked to limit detention, not to justify it. *See Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (the entry fiction is "simply a device through which needless confinement is avoided while administrative proceedings are conducted").

The Government's present application of the entry fiction is also irrational. If the Government prevails, the result would be to accord greater constitutional protection to those illegal aliens who sneak across the border undetected than to those who are stopped and subsequently paroled in after a determination that their presence would be benign. *See Plyler*, 457 U.S. at 210, 243. Such a result makes little constitutional sense. It would protect aliens whose presence and purpose previously were unknown without affording protection to those aliens whose presence and purpose were known and previously determined not to be a threat.

II. DANIEL BENITEZ HAS A DUE PROCESS RIGHT TO JUDICIAL REVIEW OF HIS DETENTION.

At the core of liberty is freedom from arbitrary restraint. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action."); *accord Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the Clause protects."). And judicial review is the only protection an individual has against arbitrary detention by the Government. Nevertheless, in this case, the Government seeks approval to detain Daniel Benitez indefinitely, without review and for no reason other than its

arbitrary decision to revoke his parole. Such indefinite detention is fundamentally incompatible with the Fifth Amendment's guarantee of due process.

Amicus does not ask this Court to set parolees like Daniel Benitez free. Amicus does not dispute that "the power of the State to confine persons who constitute a real, continuing, and serious danger to society is well established." *See Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring). Rather, Amicus merely asks that Daniel Benitez and other aliens who are present in the United States and cannot be deported be afforded an opportunity—some judicial *process*—by which to test the Government's reason for detaining him. Permitting the Government to detain parolees at its sole discretion and without reviewable explanation would vitiate the guarantee of due process afforded parolees by the Fifth Amendment.

A. Indefinite Detention Without Review of the Government's Reasoning Shocks the Conscience.

It can hardly be questioned that Daniel Benitez and other parolees cannot be summarily executed. They cannot be allowed to starve to death. They cannot be tortured. They cannot be denied medical care. The reason is clear: Some restraints on individual liberty are so egregious that they "shock the conscience," thereby violating the Fifth Amendment's due process guarantee. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)). Here, the Government asserts the authority to do something equally egregious. It claims the discretionary right through an administrative fiction to arrest a person previously paroled into the country, to place him in a cell, and potentially to detain him *forever*, without

opportunity for any sort of judicial review. *See* Brief for Appellee at 19–22, *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003) (No. 02-14324). Such an extraordinary claim of authority to deny a person's liberty shocks the conscience.[12]

B. The Government Has the Burden to Show that a Detention is Reasonable.

This Court has made clear that the Government cannot detain an individual without providing some legitimate reason for doing so. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997) (recognizing the burden on the Government to justify detention). That right is secured by the Due Process Clause of the Fifth Amendment. *See, e.g.*, *id.*; *Salerno*, 481 U.S. at 747–48. Even juveniles—a category of persons over whom the Government has great discretionary control—cannot be indefinitely detained without good reason. *See Reno v. Flores*, 507 U.S. 292, 315–16 (1993) (O'Connor,

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[12] "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199–200 (1989). "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200. "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Id*; *see also Youngberg v. Romeo*, 457 U.S. 307, 317 (1982); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

J., concurring) (stating that juveniles, despite their unique status under the law, cannot be indefinitely detained merely because a relative is not available to assume responsibility for them). To be sure, "[i]t is neither arbitrary nor capricious to detain the aliens when necessary to avoid the risk of flight or danger to the community." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., concurring). But, at the very least, persons such as Daniel Benitez must be given the opportunity to appear before a fair and impartial magistrate to challenge the Government's assertion that they are dangerous or that other good reason exists for their detention. Any other result would be "the hallmark of a police state, not a free society." *U.S. v. Montoya de Hernandez*, 472 U.S. 531, 550 (1985) (Brennan, J., dissenting).

C. International Law Also Condemns Indefinite Detention.

Not only does indefinite detention without judicial review violate the Fifth Amendment, made clear by more than a century of this Court's jurisprudence, it also is inconsistent with international norms and standards that are instructive in determining the contours of American law. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) ("[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").[13]

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[13] In the past, this Court has found support in international law principles when analyzing issues involving fundamental rights in this context and others. *See, e.g.*, *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) (citing international law as instructive on the contours of due process); *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (using comparative constitutional law to define the

It is a fundamental principle of human rights law that no one should be arbitrarily placed in detention. Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) ("A state violates international law if, as a matter of policy, it practices, encourages, or condones . . . prolonged, arbitrary detention."). The Universal Declaration of Human Rights—effectively the Declaration of Independence of international law—for example, states: "No one shall be subjected to arbitrary arrest, detention or exile." G.A. Res. 217, U.N. GAOR, 3d Sess., 183d plen. mtg. Art. 9, at 137, U.N. Doc A/810 (1948). And the International Covenant on Civil and Political Rights provides: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his

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contours of due process rights); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (using international law as persuasive authority to hold that the execution of mentally retarded individuals is cruel and unusual punishment); *Printz v. United States*, 521 U.S. 898, 921 n.11, 976 (1997) (Breyer, J., dissenting) (noting that other nations with federal systems "have found that local control is better maintained" by allowing the national government to use local governments to administer national law); *Roe v. Wade*, 410 U.S. 113, 129–33 (1973) (Blackmun, J.) (citing to Persian, Greek, Roman, and English laws to show that abortion before quickening was not an indictable offense); *New York v. United States*, 326 U.S. 572, 580, 583 (1946) (Frankfurter, J.) (appealing in two footnotes to the laws of Argentina, Canada, and Australia to uphold the right of Congress to tax the state of New York on sales of mineral waters); *Muller v. Oregon*, 208 U.S. 412, 419–20 (1907) (Brewer, J.) (adopting as persuasive authority the various foreign statutes initially presented by the soon-to-be Justice Louis Brandeis in the famous "Brandeis Brief"). It is appropriate, therefore, to examine international law principles when analyzing the justness of indefinite detention policies as applied to aliens.

detention and order his release if the detention is not lawful." G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 168, U.N. Doc. A/6316 Art. 9 para. 4 (1967).

As Justice Kennedy noted in *Zadvydas*, detention is arbitrary when it is haphazard, unwarranted, or not accompanied by fair procedures for legal review. 533 U.S. at 718–19 (Kennedy, J., dissenting) (citing, among other authorities, international law). Even when parolees such as Daniel Benitez have been detained in conformance with the law, they are stiil entitled to judicial review of the Government's reasons for their detention. Thus, denying parolees *any* opportunity to challenge the reasons for their re-arrest and indefinite detention violates not only the guarantees of the U.S. Constitution, but also principles of international law.

CONCLUSION

The Constitution exists as a bulwark against arbitrary and capricious Executive discretion. It is not for the Executive to decide whether and when his actions are appropriate, but rather this test falls to the Court. Amicus again urges the Court to make clear its view that in the absence of special circumstances, not presented in this case, no person physically present within the United States may be detained indefinitely without due process of law. For the reasons set out above, the decision of the court of appeals should be reversed.

Supreme Court, U.S.
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Nos. 03-7434, 03-878

IN THE

Supreme Court of the United States

DANIEL BENITEZ, *Petitioner,*

v.

JOHN MATA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PHIL CRAWFORD, *et al.*, *Petitioners,*

v.

SERGIO SUAREZ MARTINEZ, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES JOHN DOOLITTLE, LAMAR SMITH, AND DAVE WELDON, ALLIED EDUCATIONAL FOUNDATION, FRIENDS OF IMMIGRATION LAW ENFORCEMENT, AND NATIONAL BORDER PATROL COUNCIL AS *AMICI CURIAE* IN SUPPORT OF FEDERAL PARTIES

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. § 1231(a)(6) requires the release into American society of an inadmissible alien apprehended at the border of the United States and ordered removed if, after a six-month period of detention, the evidence suggests that there is no significant likelihood that the alien can be returned to his native country in the reasonably foreseeable future -- even when the government has determined that the alien presents a danger to public safety.

2. Whether continued detention of an inadmissible alien apprehended at the border of the United States under the scenario described above violates the alien's substantive due process rights under the Fifth Amendment.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT 11

I. § 1231(a)(6) DOES NOT PROHIBIT THE INDEFINITE DETENTION OF EXCLUDABLE ALIENS WHO POSE A PUBLIC SAFETY RISK 11

II. PROCEDURAL DUE PROCESS ISSUES ARE NOT PROPERLY BEFORE THE COURT 15

III. DETENTION OF EXCLUDABLE ALIENS DETERMINED TO POSE A PUBLIC SAFETY THREAT DOES NOT VIOLATE THE ALIENS' SUBSTANTIVE DUE PROCESS RIGHTS 17

A. Rejection of the Substantive Due Process Claims Does Not Hinge on the Continued Vitality of *Mezei* 20

IV. MARIEL CUBANS ARE NOT ENTITLED TO GREATER SUBSTANTIVE DUE PROCESS RIGHTS THAN OTHER EXCLUDABLE ALIENS 24

Page

V. NATIONAL SECURITY CONCERNS COUNSEL GRANTING GOVERNMENT POWER TO DETAIN EXCLUDABLE ALIENS INDEFINITELY 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Chin Yow v. United States,
208 U.S. 8 (1908) 23
The Chinese Exclusion Case,
130 U.S. 581 (1889) 29
Demore v. Kim,
538 U.S. 510 (2003) 18
Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 29
The Japanese Immigration Case,
189 U.S. 86 (1904) 23
Jean v. Nelson,
727 F.2d 957 (11th Cir. 1984) 29
Kwong Hai Chew v. Colding,
344 U.S. 590 (1953) 3, 29
Landon v. Plasencia,
459 U.S. 21 (1982) 12, 15
Leng May Ma v. Barber,
357 U.S. 185 (1958) 19
Lin Guo Xi v. INS,
298 F.3d 832 (9th Cir. 2002) 7, 16
Mathews v. Diaz,
426 U.S. 67 (1976) 18
Mathews v. Eldridge,
424 U.S. 319 (1976) 17
Miller v. French,
530 U.S. 327 (2000) 14
Palko v. Connecticut,
302 U.S. 319 (1937) 18
Reno v. Flores,
507 U.S. 292 (1993) 15

Page

Rochin v. California,
342 U.S. 165 (1952) 18
Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) ..... *passim*
United States v. Salerno,
481 U.S. 739 (1987) 18
United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 21
Zadvydas v. Davis,
533 U.S. 678 (2001) ..... *passim*

Statutes and Constitutional Provisions:

U.S. Const., amend. v, Due Process Clause ..... *passim*

8 U.S.C. § 1182(a) 8

8 U.S.C. § 1182(d)(5) 3

8 U.S.C. § 1182(d)(5)(A) 8, 14

8 U.S.C. § 1231(a)(6) ..... *passim*

8 C.F.R. § 212.12 17

8 C.F.R. § 212.12(g)(2) 17

Page

Miscellaneous:

Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 HARV. L. REV. 1362 (1953) 23

"High Court to Decide Fate of Refugee," *Miami Herald* (April 18, 2004) 3

"Castro's 'Crime Bomb' Inside U.S.," *U.S. News & World Report* at 27 (Jan. 16, 1984) 27

"Trouble in Paradise,"
Time at22 (Nov. 23, 1981) 27

"Carter and the Cuban Influx,"
Newsweek at 22 (May 26, 1980) 26

"President Moves to Halt Illegal Cuban Boatlift,"
Washington Post at A1 (May 15, 1980) 27

"U.S. Will 'Open Arms' to Cuban Exiles, Carter Says,"
Washington Post at A1 (May 6, 1980) 26

"Navy Ships Will Monitor Cuban Boatlift,"
Washington Post at A1 (May 1, 1980) 25

"Angry Cuban-Americans Criticize U.S. Policy on Refugees,"
Washington Post at A1 (April 27, 1980) 25

"U.S. Intends to Stem Cuban Refugee Tide,"
Washington Post at A1 (April 25, 1980) 25

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. *See, e.g., Demore v. Kim,* 538 U.S. 510 (2003); *Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Al Najjar v. Ashcroft,* 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988).

The Honorable John Doolittle, the Honorable Lamar Smith, and the Honorable Dave Weldon are United States Representatives from California, Texas, and Florida, respectively. They believe strongly that Congress and the Executive Branch ought to be permitted to protect American citizens by detaining, pending removal, those inadmissible aliens who pose a threat to public safety.

Friends of Immigration Law Enforcement (FILE) is an association of attorneys, researchers, law enforcement officers, legislators, and other experts working on behalf of Americans to ensure that immigration law is being enforced. FILE assists in filing lawsuits and complaints and helps Americans who have been harmed by our government's failure to enforce immigration law.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. Letters of consent to this filing have been lodged with the Court.

Founded in 1965, the National Border Patrol Council is the labor organization representing all (currently about 9,000) non-supervisory U.S. Border Patrol employees. The U.S. Border Patrol is a component of the U.S. Department of Homeland Security, charged with securing the nation's borders.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of recent terrorist attacks in this country, *amici* believe that the political branches of government must be afforded broad power to detain inadmissible aliens who have been convicted of serious crimes and have thereby demonstrated that they constitute threats to public safety. Yet, as a result of decisions from the Sixth and Ninth Circuits, scores of criminal aliens at this moment are walking freely on the nation's streets, despite having been convicted of serious felonies, despite being subject to final orders of exclusion/inadmissibility, despite never having been admitted into the country, and despite repeated INS/ICE determinations that they pose a danger to the community. *Amici* are filing an *amicus curiae* brief in this case because they believe that the rights of the public to be protected from the threat posed by dangerous inadmissible aliens outweigh whatever rights those inadmissible aliens may have to live freely within the United States.

Amici are also concerned by the national security and foreign policy implications of the decision below. The Sixth and Ninth Circuits have essentially held that the federal

government is powerless to prevent a foreign country from dumping all of its undesirable citizens on our shores and then refusing to take them back. By depriving the government of the option of detaining such individuals until the foreign country agrees to take them back, the Sixth and Ninth Circuits have left a large "'unprotected spot in the Nation's armor.'" *Zadvydas*, 533 U.S. at 695-96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953)).

STATEMENT OF THE CASE

Daniel Benitez (Petitioner in No. 03-7434) and Sergio Suarez Martinez (Respondent in No. 03-878) are among 125,000 Cubans who attempted to enter the United States illegally during the 1980 Mariel boatlift. A considerable number of those Cubans (including Benitez) had extensive criminal records while in Cuba:[2] Cuban leader Fidel Castro released numerous individuals from Cuban prisons and mental institutions and included them among those fleeing the Castro dictatorship by boat from the port of Mariel, Cuba. The Mariel Cubans were intercepted along the coast of Florida and were excluded from the United States. However, Castro refused to permit the Mariel Cubans to return home. As a result, the vast majority of the Mariel Cubans (including Benitez and Martinez) were temporarily paroled into this country, pursuant to 8 U.S.C. § 1182(d)(5), until such time as they either: (1)

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[2] Benitez recently told the Miami Herald that he was imprisoned in Cuba in 1973 for committing an armed robbery of a food market. App. 3a. According to the Herald, "Benitez was still in jail when Mariel happened in 1980. Benitez, then 22, and other prisoners were put on board a boat whose captain had gone to Mariel to pick up relatives. The Cuban government loaded thousands of criminals on the boats." *Id. See* "High Court to Decide Fate of Refugee," *Miami Herald* (April 18, 2004) (reprinted at Appendix A).

were deemed eligible for reclassification as resident aliens and permitted to remain here on a permanent basis; or (2) could be returned to Cuba. To date, although many thousand Mariel Cubans have been deemed ineligible for reclassification and ordered removed, less than 2,000 have been repatriated to Cuba.

While free on parole, Benitez and Martinez wasted no time accumulating extensive criminal records. In 1983, Benitez was convicted in Dade County, Florida, of second degree grand theft and was sentenced to three years' probation. No. 03-7434, Joint Appendix ("J.A.") 60. In 1993, Benitez pled guilty to a multi-count criminal indictment in Florida state court. Specifically, he pled guilty to armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery, and unlawful possession, sale, or delivery of a firearm with an altered or removed serial number. *Id.* at 62. The state court sentenced Benitez to 20 years' imprisonment. *Id.* In 2001, with 12 years remaining on his sentence, Florida paroled Benitez and released him into the custody of the Immigration and Naturalization Service (INS). *Id.* at 61.

Martinez was convicted of numerous crimes while on immigration parole, including assault with intent to murder (1983), burglary (late 1980s), petty theft with a prior conviction (1996 -- for which he received a two year prison sentence), assault with a deadly weapon (1998 -- sentenced to three years imprisonment), and attempted oral copulation by force (1999 -- sentenced to two years imprisonment). Petition in No. 03-878 ("Pet.") 7-8. Following completion of his final prison sentence in California, Martinez was released into the custody of the INS. *Id.* at 8.

Although many other Mariel Cubans paroled into the United States in 1980 were soon thereafter reclassified as permanent resident aliens, both Benitez and Martinez were denied reclassification because of their criminal convictions. J.A. 61. The INS revoked Benitez's immigration parole in 1993 (following his 1993 criminal conviction), and in 1994 found that Benitez was both excludable and deportable because of his criminal convictions. *Id.* 62. The INS revoked Martinez's immigration parole in December 2000 based on his criminal convictions. Pet. 8. In January 2001, an Immigration Judge determined that Martinez is removable and ordered him removed to Cuba. *Id.* Martinez waived an administrative appeal. *Id.* U.S. Immigration and Customs Enforcement ("ICE," the successor to the INS) has been unable to arrange their removal to Cuba, and is unlikely to be able to do so in the near future.

Proceedings Below. On January 11, 2002 (less than sixth months after he had been transferred to INS custody), Benitez filed a petition for a writ of habeas corpus in U.S. District Court for the Northern District of Florida, seeking his release from INS detention. J.A. 3-26. Benitez argued that the INS lacked statutory authority under 8 U.S.C. § 1231(a)(6) to detain him indefinitely following completion of the 90-day "removal period" (which began to run on July 27, 2003, when -- he alleges -- he was taken into INS custody), and also argued that his indefinite detention violated his Fifth Amendment *substantive* due process rights. *Id.* On July 11, 2002, the district judge adopted the magistrate judge's Report and Recommendation and dismissed the petition. *Id.* 44-49. The district judge held that *Zadvydas v. Davis*, 533 U.S. 678 (2001) -- in which the Court held that permanent resident aliens could not be detained indefinitely by the INS pending removal -- was inapplicable to excludable aliens such as Benitez. *Id.* 46. Neither the district judge nor the magistrate

judge addressed whether the *procedures* employed by the INS in determining that Benitez should be detained were constitutionally adequate.

On July 17, 2003, the Eleventh Circuit affirmed. *Id.* 59-83. The court noted that although a Cuban Review Panel had initially concluded that Benitez was releasable subject to certain conditions, the Panel revoked its Notice of Releasability on March 10, 2003 after it determined that Benitez was involved in a planned jail escape. *Id.* 64. The court held, "[I]nadmissible aliens, like Benitez, have no constitutional rights precluding indefinite detention." *Id.* 77. Nor did the court believe that 8 U.S.C. § 1231(a)(6) created any *statutory* impediment to Benitez's indefinite detention: "We . . . interpret *Zadvydas* as limiting the detention period of only those aliens whose continued confinement raises serious constitutional doubt, i.e., resident aliens who have effected entry." *Id.* 79. The court said that its decision was supported by important national security considerations:

> The ability to exclude aliens from this country at its borders is a duty entrusted to the Executive branch so that it may protect the citizens and residents of this country from all manner of nameless dangers. Creating a right to parole for unadmitted aliens after six months would create an unprotected spot in this country's defense of its borders. For example, it may be the case that the government will not be able to determine what potential dangers a particular unadmitted alien might pose. In such a situation, the government historically has enjoyed broad latitude in detaining those aliens until their security threat can be fully ascertained. Removing this important tool from the government's arsenal undoubtedly would subject the residents of this nation to greater security risks.

Id. 81. Benitez remains in ICE custody. However, pursuant to a Cuban Review Board order, he may be released as early as July 2004 if he successfully completes a residential drug treatment program.

Martinez filed a habeas corpus petition in July 2002 in U.S. District Court for the District of Oregon, seeking release from INS detention. The following month, the Ninth Circuit issued its decision in *Lin Guo Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), which held that § 1231(a)(6) prohibits detention of excludable/inadmissible aliens for more than six months after they have been ordered removed from the country, if there is little prospect that they can be removed in the foreseeable future.[3] Based on the *Lin Guo Xi* decision, the district court issued a one-paragraph order in October 2002, granting the habeas corpus petition and ordering Martinez's release. Petition Appendix in No. 03-878 ("P.A.") at 2a. On August 18, 2003, the Ninth Circuit summarily affirmed; its one-page order cited *Lin Guo Xi* as the basis for its decision. *Id.* 1a. Martinez has been free from ICE detention since March 31, 2003. Pet. 9.

SUMMARY OF ARGUMENT

Section 1231(a)(6) authorizes detention "beyond the removal period" of certain categories of aliens, including aliens (such as Benitez and Martinez) who were apprehended at the border and denied entry, aliens (such as Benitez and Martinez) who are removable because of their criminal records, and aliens (such as Benitez and Martinez) who have

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[3] *Lin Guo Xi* was a purely statutory decision. It did not consider whether there are any constitutional limitations on indefinite detention of excludable/inadmissible aliens; rather, the Ninth Circuit held that its construction of § 1231(a)(6) was mandated by *Zadvydas*.

been determined to be a risk to the community. *Zadvydas* determined that, when applied to permanent resident aliens, § 1231(a)(6)'s authorization of post-removal period detention should be read as including a temporal limitation: such detention is limited to six months plus any additional period during which there remains a "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. But, as the Eleventh Circuit correctly observed, *Zadvydas*'s interpretation of § 1231(a)(6) as applied to permanent resident aliens was driven by its concern that an interpretation that authorized indefinite detention of such aliens would raise serious constitutional concerns. J.A. 80-81. Given that (as *Zadvydas* recognized) permanent resident aliens historically have been accorded significantly greater constitutional protections than have excludable aliens, there is no reason to conclude that *Zadvydas* mandates that the same strict temporal limitations be read into § 1231(a)(6) in cases (as here) involving excludable aliens.[4]

Indeed, there are strong reasons for concluding that Congress did *not* intend § 1231(a)(6) to impose such temporal limitations in cases involving excludable aliens. In particular, any such reading of § 1231(a)(6) would be wholly inconsistent with 8 U.S.C. § 1182(d)(5)(A), which grants the Attorney General broad discretion in determining whether to parole

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[4] Immigration law historically used the term "excludable" alien to refer to an alien prevented, either at or before the border, from entering the United States. Such aliens are now classified as "inadmissible." But because the term "inadmissible" also encompasses a number of other categories of aliens, *see* 8 U.S.C. § 1182(a), *amici* throughout this brief continue to use the term "excludable" alien to refer to an alien, such as Benitez or Martinez, intercepted by immigration authorities while attempting to enter the country without permission.

excludable aliens pending removal, and whether to revoke any parole previously granted.

In his opening brief, Benitez argued for the first time that his continued detention violates his procedural due process rights. Benitez Br. 47, 49. However, that issue is not properly raised. Neither Benitez nor Martinez made a procedural due process claim in the lower courts, and the lower courts did not pass upon any such claim. Because there is virtually no lower-court record regarding the adequacy of the procedures employed by the INS/ICE in determining that public safety concerns required Benitez's and Martinez's continued detention, it would be wholly inappropriate to permit them to raise that issue for the first time in this Court.

There is no sound basis for Benitez's and Martinez's claim that the indefinite detention of an excludable alien determined by the ICE to pose a threat to public safety violates his substantive due process rights. The difficulty with that argument goes beyond the fact that it is foreclosed by this Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Critics of *Mezei* assert that it unfairly denied a long-time U.S. resident any hearing at which he could contest the government's secret evidence that he posed a danger to national security. But those critics (including the *Mezei* dissenters) asserted only that Mezei should have been afforded *procedural* due process rights, including an opportunity to be heard on the charges against him. There is virtually no support in the legal literature, and none in this Court's case law, for the proposition that an excludable alien apprehended at the border has a *substantive* due process right to enter the United States when he cannot find another country willing to take him, despite a finding (made following a fair proceeding) that he poses a threat to public safety.

Nor is there any basis for a claim that the Mariel Cubans are entitled to greater substantive due process rights than other excludable aliens. Benitez asserts that the Mariel Cubans were openly invited to come to this country with the understanding that they would eventually be accepted as political refugees just as soon as enough refugee slots opened up. Benitez Br. 19, 42-43. This revisionist version of history, propounded by both Benitez and his *amici*, is contrary to fact. At all times, the Carter Administration opposed the Mariel boatlift and took numerous steps to prevent it from occurring -- including attempting to persuade boat captains not to go to Mariel, attempting to prevent boats from landing at Key West, and fining and indicting boat captains who persisted. Government officials were well aware that a sizeable percentage of those coming on the boatlift were removed from mental hospitals and prisons and placed on board waiting ships by Cuban government officials. But despite screening efforts amid the chaos at Florida ports, the government was successful in detaining only a small percentage of the hardened criminals among arriving passengers; the great majority (including Benitez) slipped through the cracks. The predictable result: a violent crime wave hit Miami and other locations at which Mariel Cubans settled. Mariel Cubans were paroled into this country in large numbers because the government had no realistic alternative in light of our nation's humanitarian tradition and Castro's unwillingness to accept their return. But that parole was conditioned on good behavior. As *Zadvydas* recognized, the government is well within its rights when it chooses to detain an alien pending removal, even if the alien has nowhere else to go, if the alien violates the terms of his prior release.

Finally, a decision denying the government the power to detain indefinitely excludable aliens would pose serious national security concerns. The Ninth Circuit's decision

leaves the federal government powerless to prevent a foreign country from dumping all of its undesirable citizens on our shores and then refusing to take them back. The history of the Mariel Cubans illustrates that such "dumping" operations are more than a theoretical possibility. Moreover, the recent experience with Haiti indicates that attempted illegal entry by sea of massive numbers of foreigners is an ongoing problem and that detention of such foreigners until such time as they can be repatriated may be the only effective means of dealing with the problem.

ARGUMENT

I. § 1231(a)(6) DOES NOT PROHIBIT THE INDEFINITE DETENTION OF EXCLUDABLE ALIENS WHO POSE A PUBLIC SAFETY RISK

The Court held in *Zadvydas* that, at least with respect to permanent resident aliens, 8 U.S.C. § 1231(a)(6) should be interpreted as including "an implicit limitation" on the length of time that aliens may be detained pending deportation. *Zadvydas*, 533 U.S. at 689. Although no *explicit* limitation is set forth in the statute, *Zadvydas* stated that such a congressional limitation could and should be implied, both because the statute includes no "clear indication" that indefinite detention of permanent resident aliens is permissible, *id.* at 697, and because a statute authorizing such indefinite detention "would raise a serious constitutional problem." *Id.* at 690.

Neither of the factors that led the Court in *Zadvydas* to read into § 1231(a)(6) an implicit prohibition on indefinite detention of permanent resident aliens are present in this case. First, both the language and history of the immigration laws provide an unmistakably "clear indication" that Congress did,

in fact, contemplate the indefinite detention of excludable aliens in appropriate circumstances. Second, the "serious constitutional problem" identified in *Zadvydas* is absent here, because the Court has long recognized that excludable aliens enjoy far fewer constitutional rights than aliens who have "gain[ed] admission to our country and beg[un] to develop the ties that go with permanent residence." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Accordingly, there are no grounds for reading into § 1231(a)(6) a bar on indefinite detention of excludable aliens demonstrated to pose a threat to public safety.

Section 1231(a)(6) provides that certain categories of aliens "may be detained beyond the removal period." *Zadvydas* held that Congress's use of the word "may" was ambiguous in one critical respect: "[W]hile 'may' suggests discretion, it does not necessarily suggest unlimited discretion" to engage in "long-term detention of unremovable aliens." *Zadvydas*, 533 U.S. at 697. In light of its conclusion that long-term detention of unremovable resident aliens would raise serious constitutional concerns, the Court held that such detention is prohibited by § 1231(a)(6) -- even if the resident alien is adjudged a public safety risk. *Id.* at 699.

But, of course, one category of aliens whose detention is explicitly authorized by § 1231(a)(6) is any alien "who has been determined by the Attorney General to be a risk to the community." If, as *Zadvydas* held, a permanent resident alien awaiting removal cannot be held based *solely* on a determination that he poses a public safety risk, then who did Congress have in mind when it provided for such detention? Congress must have been contemplating such public-safety detention in cases involving excludable aliens, the group that historically has been afforded the lowest level of constitutional protections in connection with immigration proceedings.

Unless § 1231(a)(6) is interpreted as authorizing detention of excludable aliens based on public safety concerns, the statute's "risk to the community" language will have been deprived of all meaning -- because (based on *Zadvydas*) there is no other group whose post-removal period detention Congress could have had in mind when it explicitly authorized "risk to the community" detention.

It is no answer to suggest that Congress inserted the "risk to the community" language into § 1231(a)(6) to authorize short-term detention of dangerous excludable aliens while at the same time prohibiting any such detention for more than six months after the start of the removal period. *Zadvydas* held that § 1231(a)(6) authorizes detention of *all* removable aliens for six months following entry of a final removal order, plus any additional period during which there remains a "significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. Thus, limiting "risk to the community" detentions to that same period would effectively write the "risk to the community" language out of the statute -- in every case in which an excludable alien could be detained based on his dangerousness, he could also be detained based on the rationale set forth in *Zadvydas*.

Moreover, permitting the detention of excludable aliens based solely on their dangerousness would not constitute a congressional grant of "unlimited discretion," *id.* at 697, nor would it result in "indefinite" detention. By its plain language, § 1231(a)(6) limits such detention to those cases in which the Attorney General has determined that the excludable alien currently poses "a risk to the community," and any such determination is subject to judicial review. *Id.* at 687-88. Once that risk no longer exists, the "risk to the community" language no longer authorizes detention.

Another "clear indication" that Congress contemplated long-term detention of at least some excludable aliens can be seen in 8 U.S.C. § 1182(d)(5)(A). That statute provides that the Attorney General *may* "temporarily" parole certain aliens into the United States without having their entry deemed an "admission" into the country, but it imposes strict limits on the power to grant such parole. Moreover, the statute authorizes the Attorney General in appropriate circumstances to terminate parole and to "return" the alien "to the custody from which he was paroled." When it adopted § 1182(d)(5)(A), Congress was no doubt aware that at least some aliens at the border and seeking to be paroled into the U.S. would not readily be accepted back by their native countries. Accordingly, by adopting a statute that contemplated denial or revocation of parole for some such aliens, Congress could only have been authorizing the indefinite detention of such aliens.

Given Congress's "clear indication" that it did not intend to prohibit indefinite detention of excludable aliens demonstrated to pose a threat to public safety, the doctrine of constitutional doubt can play no role in construing the relevant statutes. "[I]f 'Congress has made its intent' in the statute 'clear, we must give effect to that intent,'" regardless of any constitutional problems caused thereby. *Zadvydas*, 533 U.S. at 697 (quoting *Miller v. French*, 530 U.S. 327, 336 (2000)).

Moreover, Congress's intent must be judged in light of the Court's pronouncements regarding constitutional limitations on detention of excludable aliens. More than 50 years ago, the Court held in *Mezei* that the potentially long-term detention of an excludable alien at Ellis Island raised no concerns under the Due Process Clause, even though the alien could find no other country willing to accept him. *Mezei*, 345 U.S. at 216. In light of *Mezei*, Congress would have had no constitutionally-based reason -- when adopting subsequent

immigration legislation touching on the detention of excludable aliens -- to avoid provisions authorizing long-term detention. Under those circumstances, any effort by the courts to impute such an intent to Congress is not a legitimate form of statutory construction.

In any event, as we explain at more length in Section III, *infra*, the Court has long recognized that excludable aliens enjoy far fewer constitutional rights than aliens who have "gain[ed] admission to our country and beg[un] to develop the ties that go with permanent residence." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Regardless whether the Court is prepared to re-affirm *Mezei* in toto, there can be little doubt that Benitez and Martinez possess far fewer due process rights with respect to their immigration status than do permanent resident aliens such as Kestutis Zadvydas -- and thus the "serious constitutional problems" identified in *Zadvydas* are far less weighty in cases, as here, involving the detention of excludable aliens. Under those circumstances, the constitutional concerns that led the Court in *Zadvydas* to read into § 1231(a)(6) an implied limitation on the duration of post-removal period detention of permanent resident aliens have no bearing on whether a similar implied limitation should be read into the statute with respect to the detention of excludable aliens. *See Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) ("Statutes should be interpreted to avoid *serious* constitutional doubts, . . . not to eliminate all possible contentions that the statute *might* be unconstitutional.").

II. PROCEDURAL DUE PROCESS ISSUES ARE NOT PROPERLY BEFORE THE COURT

In his opening brief, Benitez argued for the first time that his continued detention violates his procedural due process rights. Benitez Br. 47, 49. However, that issue is not properly

raised. Neither Benitez nor Martinez made a procedural due process claim in the lower courts, and the lower courts did not pass upon any such claim. Because there is virtually no lower-court record regarding the adequacy of the procedures employed by the INS/ICE in determining that public safety concerns required Benitez's and Martinez's continued detention, it would be wholly inappropriate to permit them to raise that issue for the first time in this Court.

In his Report and Recommendation to the district court, the magistrate judge clearly understood Benitez to be raising only a *substantive* due process claim: "Petitioner asserts that mandatory indefinite detention is unconstitutional and that he is entitled to release based on *Zadvydas v. Davis*." J.A. 37. In adopting that report, the district court displayed a similar understanding. *Id.* 44-49. The Eleventh Circuit stated that Benitez was "arguing only that his indefinite detention is impermissible given the Supreme Court's decision in *Zadvydas*" -- a decision that contains no discussion of procedural due process issues. *Id.* 66. The appeals court affirmed without including any discussion of the manner by which the Cuban Review Panel arrived at its decision that Benitez should be detained pending removal.

The record in No. 03-878 is similarly bereft of any indication that Martinez complained about the fairness of the proceedings that led to his post-removal period detention. In ordering Martinez's release from detention, the Ninth Circuit cited solely to its prior decision in *Lin Guo Xi*. *Lin Guo Xi* was a statutorily-based decision: it held that *Zadvydas* required that § 1231(a)(6) be interpreted to prohibit indefinite detention of both permanent resident aliens *and* excludable aliens. *Lin Guo Xi*, 298 F.3d at 836. The Ninth Circuit made no mention of the fairness of the procedures that led to the INS/ICE decision to detain Martinez.

The ICE has adopted detailed procedures for determining whether Mariel Cubans still designated as "excludable" aliens should be paroled into the country, or whether their parole should be revoked. *See* 8 C.F.R. § 212.12. The regulations require the ICE to review all cases involving detained Mariel Cubans at least once a year. 8 C.F.R. § 212.12(g)(2). Mariel Cubans who are unhappy with parole determinations made pursuant to those regulations may seek review in the federal courts under the Administrative Procedure Act. Benitez now claims that those regulations failed to provide him with a fair opportunity to contest his detention. Because he is raising that claim for the first time in this Court and the claim has not been addressed by the lower courts, the Court should decline to address it in the first instance.

III. DETENTION OF EXCLUDABLE ALIENS DETERMINED TO POSE A PUBLIC SAFETY THREAT DOES NOT VIOLATE THE ALIENS' SUBSTANTIVE DUE PROCESS RIGHTS

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the federal government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the

concept of ordered liberty.'" *United States v. Salerno,* 481 U.S. 739, 746 (1987) (quoting *Rochin v. California,* 342 U.S. 165, 172 (1952), and *Palko v. Connecticut,* 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a law that permits the federal government to protect its citizens by detaining those excludable aliens who have been convicted of serious felonies, have been ordered removed from the country, and have been determined to constitute "a risk to the community" if released from detention during the period necessary to effect their removal.

Were Benitez and Martinez citizens, their detention based on dangerousness would raise serious constitutional concerns. In general, government detention of citizens violates substantive due process when imposed outside the context of the criminal justice system. *See, e.g., United States v. Salerno,* 481 U.S. 739 (1987). But, "'[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz,* 426 U.S. 67, 79-80 (1976)). *Demore* rejected a substantive due process challenge to the detention, pending completion of removal proceedings, of permanent resident aliens convicted of aggravated felonies.

Dicta in *Zadvydas* suggested that substantive due process protection extends to permanent resident aliens, such that they may not be detained indefinitely based on a finding of dangerousness if they have been ordered removed but can find no country willing to take them.[5] But *Zadvydas*'s discussion

[5] *Zadvydas*'s discussion of substantive due process is largely *dicta*, because the Court ultimately based its decision in the case on its (continued...)

of substantive due process is of little help to Benitez and Martinez, because they are excludable aliens and because *Zadvydas* emphasized repeatedly that permanent resident aliens are entitled to significantly greater constitutional protections than are excludable aliens. *See, e.g., Zadvydas*, 533 U.S. at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."). The Court explained:

> It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders. . . . But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

Id.

As *Zadvydas* noted, excludable aliens have long been deemed, for constitutional purposes, never to have entered the country -- even when their place of detention is actually within the United States and regardless that they may have been paroled temporarily into the country while they await removal. *See, e.g., Mezei*; *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1958) (alien paroled into the United States pending a determination on admissibility did not effect an "entry").

[5](...continued)
interpretation of a statute, 8 U.S.C. § 1231(a)(6).

The enhanced constitutional status of permanent resident aliens in comparison to excludable aliens makes eminent sense -- the former group generally has been physically present in the United States for a longer period of time and thus has had a greater opportunity to develop close ties with our society and to assume rights and responsibilities that closely resemble those of citizens. Even when an excludable alien has been paroled into the United States for a lengthy period of time, he cannot forge societal ties to the same degree as permanent resident aliens because he knows that his parole is only temporary and is subject to revocation at any time. That is particularly true for Benitez and Martinez, who have spent a significant portion of their years in the United States behind bars and who have known since soon after coming to this country that their criminal records prevented them from ever being reclassified as permanent resident aliens. Of course, no one can know for sure when Fidel Castro will die and how long it will take his successor to normalize relations with the United States. But whether it takes two years or 20 years, Benitez and Martinez have known for many years that they will be removed to Cuba at the earliest available opportunity -- and thus that they have no reasonable basis for seeking to establish permanent ties to this society.

A. Rejection of the Substantive Due Process Claims Does Not Hinge on the Continued Validity of *Mezei*

In *Mezei*, the Court rejected due process claims raised under circumstances largely indistinguishable from the facts of this case. The Court upheld the government's decision to prevent Mezei from entering the country because it deemed him a national security risk; in response to Mezei's claim that the decision to exclude him violated his due process rights, the Court held, "'Whatever the procedure authorized by Congress

is, it is due process as far as an alien denied entry is concerned.'" *Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950)). The Court upheld the exclusion even though it recognized that the practical result was Mezei's indefinite detention at Ellis Island because no other country was willing to accept him. *Id.* at 216. *Mezei* dictates the rejection of Benitez's and Martinez's due process claims. Indeed, Mezei's exclusion and detention were upheld even though he had far stronger ties to the United States than did Benitez and Martinez -- he had lived in the United States as a resident alien for 25 years before traveling to Europe in 1948; his wife and family remained in Buffalo, New York; he attempted to return to the United States less than two years after his departure; and unlike Benitez and Martinez, he had no criminal record.

Benitez and his *amici* have mounted a full-scale assault on *Mezei*, asserting that it is inconsistent with due process decisions that came both before and after. *See, e.g.*, Benitez Br. 45; Brief of *amicus curiae* American Bar Association (ABA); Brief of Law Professors as *amici curiae*. But that criticism is largely beside the point. Detention of excludable aliens found to constitute a danger to public safety is constitutionally defensible without regard to whether the Court chooses to re-affirm *Mezei*. Criticism of *Mezei* has focused largely on its failure to recognize Mr. Mezei's *procedural* due process claims; but such criticism is of little benefit to Benitez and Martinez, because the Questions Presented to the Court do not encompass procedural due process claims.

The initial critics of *Mezei* were the four dissenting justices: Justices Black, Douglas, Jackson, and Frankfurter. The sole basis for their dissents was that the government had denied Mezei *procedural* due process by refusing to disclose any of the evidence upon which it based its finding that Mezei

posed a threat to national security. *Mezei*, 345 U.S. at 218 (Black, J., dissenting) ("[Due process] means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor."); *id.* at 227 (Jackson, J., dissenting) ("[W]hen indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them."). Indeed, Justice Jackson explicitly rejected Mezei's claim that his indefinite confinement violated his substantive due process rights. He explained:

> Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances. Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion. . . . Nor do I doubt that due process of law will tolerate some impounding of an alien where it is deemed essential to the safety of the state. . . . Nor do I think the concept of due process so paralyzing that it forbids all detention of an alien as a prevention measure against threatened dangers and makes confinement lawful only after the injuries have been suffered. . . . I conclude that detention of an alien would not be inconsistent with substantive due process, provided -- and this is where my dissent begins -- he is accorded procedural due process of law.

Id. at 222-24.

Subsequent critics of *Mezei* focused principally on its refusal to accord *any* procedural due process rights to aliens

protesting their exclusion from the United States. They noted that prior Supreme Court case law had granted at least *some* procedural due process rights to aliens defending against deportation efforts (even aliens who had been in the country only a few days before being detected),[6] and they argued that those same procedural rights should logically be extended to aliens protesting their exclusion. *See, e.g.*, Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 HARV. L. REV. 1362, 1390-95 (1953). But virtually none of the criticism has taken issue with Justice Jackson's view in dissent, that the government would have been within its rights in excluding Mezei from the country if, after a fair hearing, it had demonstrated that Mezei really did constitute a threat to public safety.

The ABA insists that *Mezei* is somehow out of step with the Court's substantive due process case law. ABA Br. 18-23. But the only cases it cites are cases involving the detention of *citizens*. As noted above, the Court has repeatedly held that aliens, and excludable aliens in particular, possess far fewer substantive due process rights than do citizens. *See, e.g., Demore* (upholding detention of aliens even though substantive due process principles would have prohibited detention of citizens in similar circumstances); *Zadvydas*, 533 U.S. at 693 (noting, in connection with discussion of substantive due process rights, that "[t]he distinction between

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[6] *See, e.g., The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1904) (proceedings are constitutionally deficient if an alien facing deportation is not afforded an opportunity to present her case, albeit that opportunity may take the form of an informal administrative hearing). The Court also held that if a person being excluded claims to be a citizen, due process requires that he be provided a hearing on his citizenship claim. *Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908).

an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.").

Amici do not contend that the due process clause provides no substantive protections whatsoever to excludable aliens. For example, any torture of Benitez and Martinez would surely constitute conduct that "shocks the conscience" and thus would violate their substantive due process rights. But given the highly tenuous nature of their connection with the United States, any rights that both they and other excludable aliens may assert with respect to entry into the United States are easily outweighed by the right of the American people to be protected from dangerous criminals.

In sum, *Mezei*'s holding that excludable aliens lack *any* procedural due process rights in connection with their exclusion (and, indeed, that they may be excluded on the basis of secret evidence) has proven to be highly controversial. But even if the Court chooses not to re-affirm this controversial aspect of *Mezei,* it should still rule in favor of the ICE/INS because this Court's case law -- both before and after *Mezei* -- has consistently rejected substantive due process claims asserted by excludable aliens as their basis for contesting exclusion.

IV. MARIEL CUBANS ARE NOT ENTITLED TO GREATER SUBSTANTIVE DUE PROCESS RIGHTS THAN OTHER EXCLUDABLE ALIENS

Benitez and Martinez argue alternatively that even if the great mass of excludable aliens lack substantive due process rights to be free from indefinite detention, the unique position of Mariel Cubans entitles them to such substantive rights. Benitez asserts that the Mariel Cubans were openly invited to

come to this country with the understanding that they would eventually be accepted as political refugees just as soon as enough refugee slots opened up. Benitez Br. 19, 42-43. This revisionist version of history, propounded by both Benitez and his *amici*, is contrary to fact.

The Mariel boatlift began in April 1980 not through any action of the United States (which tried repeatedly to stop the boatlift), but when Cuba's Fidel Castro (acting in response to political unrest) announced that Cubans wishing to leave the country would be free to leave by boat from the port of Mariel. In response, President Carter stated that while the United States was willing to accept up to 3,500 refugees, it opposed any effort by the refugees to enter by boats. *See* "U.S. Intends to Stem Cuban Refugee Tide," *Washington Post* at A1 (April 25, 1980). Prominent Cuban-American leaders were called to a meeting in Washington on April 26 at which senior administration officials pleaded with them to end their support for the boatlift; most of the boats ferrying Cubans from Mariel were American boats that crossed over from Florida. *See* "Angry Cuban-Americans Criticize U.S. Policy on Refugees," *Washington Post* at A1 (April 27, 1980). Administration officials stated that they feared the boatlift "could swamp the country with untold thousands of people seeking to get out of Cuba," but admitted that the boatlift could not be checked "if the Florida Cuban community continues to encourage and finance it." *Id.* One government official "noted that fines of $1,000 for each person brought in illegally are being levied against boat owners engaged in the traffic, and he warned that the government w[ould] move to stiffer penalties, such as criminal prosecutions, if necessary." *Id.*

By May 1, the number of immigrants was approaching 10,000, with no end in sight. *See* "Navy Ships Will Monitor Cuban Boatlift," *Washington Post* at A1 (May 1, 1980). News

reports indicated that large numbers of criminals were included among the immigrants. U.S. Rep. Elizabeth Holzman, a supporter of the boatlift, toured the Key West docks and told the *Post*, "Just about every adult male I have talked to admitted to having been in prison in Cuba." *Id.* The Carter Administration promised to begin screening for criminals; it also stated that in an effort to slow the flood, three boats had been seized. *Id.*

The administration stated on May 5 that it was asking other countries to agree to accept a portion of the immigrants. It was within this context that President Carter, in response to a question, made the May 5 "open arms" statement upon which Benitez places so much reliance. In response to those who argued that the Navy should be preventing ships from landing in Florida, the President said, "We as a nation have always had our arms open to receiving refugees in accordance with American law." In response to Cuban-American leaders who pointed to this statement as a sign of relaxation of American policy opposing the boatlift, Presidential aide Jody Powell "said the president's remarks did not signal a change in overall refugee policy, but an attempt 'to deal with the situation as it exists.'" *See* "U.S. Will 'Open Arms' to Cuban Exiles, Carter Says," *Washington Post* at A1 (May 6, 1980). White House aides later insisted that the May 5 statement had been "misinterpreted" and that the President had always contemplated "strict enforcement of the law against illegal entry." *See* "Carter and the Cuban Influx," *Newsweek* at 22 (May 26, 1980).

By May 14, nearly 40,000 immigrants had arrived in Florida, and President Carter stepped up efforts to halt the boatlift. He "announced that beginning immediately the United States w[ould] accept only Cubans with relatives in the United States, Cuban political prisoners and those Cubans who

ha[d] taken refuge in the U.S. diplomatic mission and the Peruvian Embassy in Havana." *See* "President Moves to Halt Illegal Cuban Boatlift," *Washington Post* at A1 (May 15, 1980). The U.S. offered to provide transit to those individuals, but only if Cuba first agreed "to allow American officials to screen potential refugees in Havana to assure that they fit into one of the four categories." *Id.* Castro simply ignored that policy and continued sending out ships from Mariel. Other efforts -- including a Justice Department attempt on June 2 to turn back a freighter carrying 950 Cubans and the June 24 indictment of 78 people who brought Cubans to Florida in violation of the President's May 15 ban -- failed to stem the tide. Before Cuba unilaterally ended the boatlift on September 26, 125,000 Cubans had made there way to Florida.

No one really knows how many hardened criminals were among that group. The federal government initially detained about 1,800 of the Mariel Cubans as suspected criminals, but the great majority of hardened criminals (including Benitez) slipped through the cracks and were paroled into this country. Many law enforcement officials have estimated that about 40,000 Cuban prison inmates (including at least 20,000 "hardened criminals") were included in the boatlift. *See, e.g.*, "Castro's 'Crime Bomb' Inside U.S.," *U.S. News & World Report* at 27 (Jan. 16, 1984). Miami quickly assumed the title of "murder capital" of the nation, and official attributed at least ½ of all violent crimes in the city to Mariel Cubans. *See* "Trouble in Paradise," *Time* at 22 (November 23, 1981). Scores of domestic airline flights were hijacked to Havana in the early 1980s; more than 90% of the hijackings were attributed to Mariel Cubans.

In sum, nothing about the sorry history of the Mariel boatlift supports Benitez and Martinez's claims. The Mariel Cubans came despite active U.S. efforts to keep them away,

not (as Benitez claims) in reliance on an invitation from President Carter. Benitez could not possibly have relied on any such invitation, because he was taken from prison by Cuban officials and placed involuntarily on a boat. Moreover, the huge amount of crime attributable to the Mariel Cubans underscores the importance of permitting the government to take effective steps to exclude undesirable aliens from the country.

V. NATIONAL SECURITY CONCERNS COUNSEL GRANTING GOVERNMENT POWER TO DETAIN EXCLUDABLE ALIENS INDEFINITELY

Benitez and Martinez arrived at America's shores as part of a group of 125,000 Cubans who attempted to enter the country illegally by boat in the summer of 1980. Once it became clear that Castro would not accept their return to Cuba, the federal government had three options short of admitting the Mariel Cubans as permanent residents: (1) it could turn the boats away and allow them to founder in the high seas; (2) it could detain the Cubans; or (3) it could parole them temporarily into American society until such time as their repatriation could be arranged. The first was not a realistic option in light of our humanitarian traditions. Thus, the United States chose a combination of the second and third options -- it paroled most of the Mariel Cubans pending repatriation, except that it detained (or canceled parole for) those small number of individuals who were determined to pose a threat to public safety.

The Ninth Circuit's decision *requires* the federal government to adopt the third option as a matter of constitutional law. That decision raises serious national security concerns. It leaves the federal government powerless to prevent a foreign country from dumping all of its

undesirable citizens (or a total number of citizens in excess of our capacity to absorb them into our society) and then refusing to take them back. Indeed, the evidence is clear that the Cuban government engaged in just such a "dumping" operation in 1980 in connection with the Mariel Cubans. The Court has made clear that the federal government is entitled to control immigration as a means of protecting national security and thereby ensuring that there is "'no unprotected spot in the Nation's armor.'" *Zadvydas*, 533 U.S. at 695-96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953)).

Numerous courts have recognized that national security concerns are a legitimate basis for detaining excludable aliens pending their repatriation. For example, in upholding the INS's authority to detain excludable aliens who had arrived by boat from Haiti, the Eleventh Circuit observed:

> [T]he Supreme Court has long recognized that the exclusion process is intimately related to considerations of both national security and foreign policy. *See, e.g., Harisiades* [*v. Shaughnessy*], 342 U.S. [580,] 588-89 [(1952)] ("Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . ."); *The Chinese Exclusion Case*, 130 U.S. [581,] 606 [(1889)] (noting that threats to national security can come both "from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us").

Jean v. Nelson, 727 F.2d 957, 977 n.28 (11th Cir. 1984).

Amici recognize that *Jean* involved excludable aliens who were being detained while their exclusion/removal proceedings were ongoing. The INS did not suggest that Haiti would be unwilling to accept the return of its citizens should

their asylum claims be denied. In contrast, Benitez and Martinez have had final orders of exclusion entered against them and (at least at the time they filed their habeas corpus petitions) were facing the prospect of indefinite detention. Nonetheless, the national security concerns that animated *Jean* are equally present in this case. Unless the ICE retains the option of detaining excludable aliens who come to our shores from countries (such as Cuba) that are unwilling to accept their citizens back, there is a serious danger that we will be overwhelmed by increasing numbers of such aliens seeking to enter the United States illegally. Under the Ninth Circuit's decision, those contemplating illegal entry from such countries will be encouraged to do so because they can rest assured that they will be permitted to live indefinitely in the United States, regardless whether they qualify for refugee status and regardless whether they pose a threat to public safety. Congress could not have intended to leave such a massive unprotected spot in the nation's armor.

CONCLUSION

Amici curiae respectfully request that the Court affirm in No. 03-7434 and reverse in No. 03-878.

Respectfully submitted,

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APPENDIX A

Newspaper article from the April 18, 2004 Miami Herald:

HIGH COURT TO DECIDE FATE OF REFUGEE
Daniel Benitez, a Mariel refugee in indefinite detention, wants the U.S. Supreme Court to order his release.

By Alfonso Chardy

DENVER - Daniel Benitez may well become a figure in U.S. legal history when the Supreme Court rules on his case this year.

Benitez, a former Miami resident, is one of two cases the high court will review in October to decide whether immigration authorities can detain foreign nationals indefinitely, including Cuban Mariel inmates whose government refuses to take them back.

Benitez, 46, sums up his predicament simply.

"Let me go free or send me back to Cuba," he said in a recent interview at a federal prison near Denver.

Benitez argued in his October petition to the Supreme Court that there is no valid reason to keep him in detention because he has served his sentence and the high court itself has ruled against indefinite detention.

If the high court agrees, the decision will have a wide impact -- likely resulting in the immediate release of about 900 Mariel detainees at various federal facilities nationwide.

"This case presents an opportunity for the court to redress a long standing injustice," said Judy Rabinovitz of the American Civil Liberties Union who has been at the forefront of the issue.

Though the Supreme Court ruled in 2001 that foreign nationals cannot be detained indefinitely, it did not resolve the question of whether Mariel detainees like Benitez can go free. The reason: the court said foreigners who had technically not gained entry into the country "would present a very different

question" from those lawfully admitted or snuck in. Mariel detainees are considered stopped at the border, thus unadmitted.

The Bush administration interpreted the Supreme Court ruling as exempting Mariel detainees, but not everyone agrees with that analysis. Since the ruling, federal appeals courts have been split, some favoring release; others not.

2 Different Cases

The high court chose two radically different Mariel cases to settle the issue: Benitez, whose appeals court in Atlanta refused release, and Sergio Suarez Martinez, whose appeals court in San Francisco ordered supervised release. Benitez's rap sheet is long. He was first convicted in 1983 and was sentenced to three years probation for grand theft in Dade County. He got convicted again in 1993, also in Dade, for armed robbery, aggravated battery and unlawful possession of a firearm. He was sentenced to 20 years, but served eight.

Sweeping Law

But when Benitez was about to be released early in 2001, immigration authorities took him into custody. A sweeping 1996 law authorizes detention of foreign nationals convicted of felonies pending deportation -- even if the conviction occurred prior to passage of the law.

He started writing legal briefs, asking federal courts to release him, after the Supreme Court ruled that foreign nationals could not be detained indefinitely.

A North Florida federal court rejected his petition. He appealed to the 11th Circuit Court of Appeals in Atlanta, which appointed Jacksonville attorney John Mills to the case. But the 11th Circuit also refused to release him.

Mills then appealed to the Supreme Court asking that it clarify whether its 2001 ruling applies to foreign nationals stopped at the border.

"The statute that Congress enacted to authorize detention of an alien after removal only authorizes temporary detention," Mills said. "The only question is whether the same statute should be interpreted more harshly for Mariel Cubans."

Benitez was at a federal facility in Terre Haute, Ind., when the Supreme Court agreed to take his case. "I was watching TV and heard my name," Benitez recalled, his eyes filling with tears. "I was so excited that I cried."

Benitez has spent time in various federal prisons -- including a medium-security facility near Denver, where he talked about his case, and his life, during a two-hour interview. Divorced, he has no children.

Born in Havana in 1958, Benitez was largely raised by his mother after his father died of a heart attack when he was 10. At age 15, he said, Cuban police arrested him after he and a friend held up a market, stealing money, chickens and a sack of rice.

"My family needed food," Benitez says. "I wanted to bring food in the house. In Cuba, we didn't get anything from the government."

Jehovah's Witness

He said the government denied assistance to his family because his mother was a Jehovah's Witness. Many followers of the religion in Cuba have complained of persecution.

Benitez was still in jail when Mariel happened in 1980. Benitez, then 22, and other prisoners were put aboard a boat whose captain had gone to Mariel to pick up relatives. The Cuban government loaded thousands of criminals on the boats.

Benitez said he fondly recalled his first memory of Key West -- a speedboat whizzing by with a topless woman waving at the refugees.

"It looked like paradise," said Benitez. "Then we were given a speech by a military officer who said, 'welcome to the United States, the land of the free where you will be free.'"

The day after his arrival, Benitez was shipped to the Krome processing center, where a relative signed him out. A week later he had a job as a busboy at a restaurant. His family now wants him home.

"We are hoping the Supreme Court will order his release because there is no greater violation of human rights than to keep someone in detention when he has served his sentence," said Roberto Benitez, 52, Daniel's older brother in Hialeah.

"He's a very talented man," said Emilio de la Cal, a Miami attorney who represented Benitez in South Florida and whose wife is a cousin of Benitez. "He came from Cuba, with no schooling, and no English and now he speaks English and writes very well."

Benitez says he regrets having committed crimes, but should not be kept detained forever.

"I made mistakes," he said. "But I have paid my debt to society and I should be free."